CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 66

ESTATE OF HENRY H. ROGERS, DECEASED, H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTORS, PETITIONERS,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 20, 1943.

CERTIORARI GRANTED JUNE 21, 1943.

INDEX

	Original	Print
Docket Entries	1	1
Petition	3	3
Amendment to Petition (Exhibit A)	14	10
Answer	24	18
Transcript of Hearing Before the Board on June 5, 1941	27	20
Memorandum Opinion	37	25
Transcript of Hearing Before the Board on March 18, 1942	40	27
Decision and Memorandum to Accompany Decision	61	37
Petition for Review and Proofs of Service	63	39
Stipulation of Facts	73	46
Exhibit A	81	51
Exhibit B	84	53
Exhibit C	92	60
Exhibit D	124	77
Praecipe	156	111

Proceedings in U. S. C. C. A., Second Circuit	113
Opinion, Frank, J.	113
Concurring opinion, Hand, J.	119
Judgment	122
Order allowing certiorari	123

498427—42——1

1 DOCKET No. 100026

ADRIAN H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY H. ROGERS, DECEASED. AMENDED TITLE—See order 9/25/39—ESTATE OF HENRY H. ROGERS, DECEASED, ADRIAN H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For Taxpayer: John W. Drye, Jr., Harold A. Donegan, Arthur W. Siegrist. For Comm'r: W. Frank Gibbs.

Docket Entries

1939

Sept 15—Petition received and filed. Taxpayer notified. (Fee paid.)

Sept. 16—Copy of petition served on General Counsel.

Sept. 15—Request for Circuit hearing in New York City filed by taxpayer. 9/16/39 copy served.

Sept. 20—Amendment to petition filed by taxpayer. (90-day letter.) 9/20/39 copy served.

Sept. 23—Motion to amend the caption, filed by taxpayer.

Sept. 25—Order amending caption to read, Estate of Henry H. Rogers, Deceased, Adrian H. Larkin, Albert Stickney and Central Hanover Bank and Trust Company, Executors, entered.

Nov. 6—Answer filed by General Counsel.

Nov. 9—Copy of answer served on taxpayer. New York.

1941

March 5—Hearing set April 21, 1941, in New York City.

April 24—Hearing had before Mr. Hill on motion of respondent cont. May 12, New York, granted. Continued New York calendar of May 12, 1941.

April 24—Order of continuance to May 12, 1941, New York City, entered.

April 30—Hearing set June 23, 1941, New York, New York.

May 1—Hearing set May 12, 1941, New York, New York, revised notice.

May 15—Hearing had before Mr. Disney on motion of parties to continue. Granted, and continued to New York, June 2, 1941.

2 May 15—Order of continuance to the New York City calendar of June 2, 1941, entered.
May 17—Hearing set June 2, 1941, New York City.
May 19—Transcript of hearing 5/15/41 filed.
June 5—Hearing had before Mr. Murdock on merits. Submitted. Stipulation of facts filed. Petitioner's brief due in 30 days. Respondent's 30 days thereafter. 15 days to reply.
June 10—Transcript of hearing 6/5/41 filed.
July 3—Brief filed by taxpayer. 7/3/41 copy served on General Counsel.
Aug. 1—Motion for extension of time to Sept. 4, 1941, to file brief filed by General Counsel.
Aug. 30—Reply brief lodged by General Counsel. 9/4/41 granted.
Sept. 19—Reply brief filed by taxpayer. 9/19/41 copy served.
Dec. 20—Memorandum opinion rendered. Murdock. Decision will be entered under Rule 50. 12/22/41 copy served.

1942

Feb. 27—Computation of deficiency filed by taxpayer.
Mar. 4—Hearing set March 18, 1942, on settlement.
Mar. 4—Computation of deficiency filed by General Counsel. 3/5/42 copy served.
Mar. 4—Copy of computation and notice of hearing served on General Counsel.
Mar. 18—Hearing had before Mr. Murdock on settlement under Rule 50. Argued. Taken under advisement. Petitioner's brief filed at hearing and copy served. Respondent's none due.
May 5—Transcript of hearing 3/18/42 filed.
May 12—Decision entered. Murdock, Div. 3. (Memorandum to accompany decision.)
Aug. 4—Petition for review by U. S. Circuit Court of Appeals, 2nd Circuit, with assignments of error filed by General Counsel.
Aug. 12—Proof of service filed by General Counsel. (2).
Aug. 14—Proof of service filed by General Counsel.
Sept. 23—Motion for extension of time to Dec. 2, 1942, to complete and transmit the record filed by General Counsel.
Sept. 23—Order enlarging time to Dec. 2, 1942, to prepare and deliver the record entered.
Nov. 17—Agreed praecipe for record filed by General Counsel, with proof of service thereon.

3

United States Board of Tax Appeals

Docket No. 100026

ADRIAN H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY H. ROGERS, DECEASED, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

United States Board of Tax Appeals. Sept. 15, 1939.

Petition

The above-named petitioners hereby petition for a redetermination of the alleged deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (MT-ET-8941), dated June 29, 1939, and as the basis of this proceeding allege as follows:

1. The petitioners are the duly qualified and acting Executors of the Last Will and Testament of Henry H. Rogers, deceased, who died on July 25, 1935, a resident of Southampton, Suffolk County, New York, Letters Testamentary having been duly granted to them by the Surrogate's Court of said County on October 28, 1935. Said Letters are still in full force and effect. The petitioner, Adrian H. Larkin, resides at Southampton, New York, and the petitioner, Albert Stickney, resides at 8 East 93rd Street, New York City, New York. The pe-

4 titioner, Central Hanover Bank and Trust Company, is a corporation duly organized and existing under the laws of the State of New York, having its principal office and place of business at 70 Broadway, New York City, New York. The Federal Estate Tax return for the estate of said decedent was filed with the Collector for the 1st District of New York on July 24, 1936.

2. Upon information and belief, the Notice of Deficiency, a copy of which is attached hereto and marked Exhibit A, was mailed to the petitioners on June 29, 1939.

3. The tax in controversy is the Federal estate tax with respect to the estate of said decedent and amounts to $1,754,922.83. The deficiency in estate tax asserted amounts to $849,524.19, all of which is in controversy and petitioners claim that they are entitled to a refund of $1,505,398.64, which amount was paid by petitioners within three years before the filing by them of a claim for refund.

4. Upon information and belief, the determination of tax set forth in said Notice of Deficiency is based upon the following errors:

(a) The Commissioner of Internal Revenue erred in determining that the value of 890 shares of the capital stock of 1005 Grand Avenue Corporation should be increased from $89,001.-83, as reported by the petitioners in said return, to $147,393.78.

(b) The Commissioner of Internal Revenue erred in failing to allow as a deduction from the value of the property comprising the trust created under the Will of decedent's
5 father, Henry H. Rogers, Sr., deceased, for the benefit of Henry H. Rogers and over which he had and exercised a power of appointment, the sum of $35,000, representing additional attorneys' fees which will be paid in connection with an accounting proceeding with respect to said trust.

(c) The Commissioner of Internal Revenue erred in failing to deduct from the value of the property comprising the trust created under the Will of decedent's father, Henry H. Rogers, Sr., deceased, for the benefit of decedent and over which he had and exercised a power of appointment, the value of the life estates in said property of Pauline V. Hoving, decedent's widow, and Millicent R. Balcom, decedent's daughter and the value of that portion of said property which passed to them outright.

(d) The Commissioner of Internal Revenue erred in allowing as deductions for Executors' commissions and attorneys' fees only the amounts paid therefor at the date of his determination, instead of the total amounts which have been and will be paid.

(e) The Commissioner of Internal Revenue erred in failing to allow as a deduction the indebtedness of decedent to Bankers Trust Company in the amount of $21,875, arising from a certain agreement of guaranty executed by decedent on July 30, 1928.

(f) The Commissioner of Internal Revenue erred in allowing as credit for state estate, inheritance, legacy or succession taxes paid only the amount of such taxes paid at the date of his determination, instead of the total amount which has been and will be paid.

(g) The Commisioner of Internal Revenue erred in failing to find that petitioners are entitled to a refund of estate tax of $1,505,398.64.

6 5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a) The fair market value at the date of death of said decedent of the 890 shares of the capital stock of 1,005 Grand Avenue Corporation referred to in paragraph 4. subparagraph

(a) of this petition was not in excess of the value reported in the Federal Estate Tax return, viz, $89,001.83. The value erroneously placed on said stock by the Commissioner of Internal Revenue is $147,393.78. Accordingly, said stock has been overvalued in the amount of $58,391.95.

(b) The Commissioner of Internal Revenue has allowed as a deduction for attorneys' fees from the value of the property comprising the trust created under the Will of decedent's father, Henry H. Rogers, Sr., deceased, for the benefit of decedent and over which he had and exercised a power of appointment, the sum of $107,500, which he determined had been paid. In due course, an additional sum of $35,000 will be paid to Messrs. Davis, Polk, Wardwell, Gardiner & Reed, for attorneys' fees in connection with an accounting proceeding with respect to said trust. Accordingly, the total deduction for attorneys' fees with respect to said trust should be $142,500.

(c) Henry H. Rogers, Sr., the father of decedent, died on May 19, 1909, leaving a Last Will and Testament which was duly admitted to probate in the Surrogates' Court of New York County on May 28, 1909. Article Eighth of said Will of Henry H. Rogers, Sr., deceased, provided in part as follows:

7 "EIGHTH

"All the Rest, Residue, and Remainder of my property, both real and personal, of every kind and description whatsoever and wheresoever situated, I give, devise and bequeath to my Trustees, hereinafter named, IN TRUST, however, for the uses and purposes following:

"I. To divide the said property into as many equal shares, as I shall leave children me surviving, and lineal descendants of deceased children, one share for each child and one share for the lineal descendants of each deceased child; the names of all my children now living being Anne Engle Benjamin, Cara Leland Broughton, Mai Rogers Coe and Henry Huttleston Rogers, Jr."

* * * * * *

"IV. To apply the income of each share, set apart for the benefit of any child of mine, who shall not have attained the age of forty years, at the time of my death, to the use of such child, until he shall attain the age of forty years, and thereupon to convey, transfer and pay over to the said child one-half of the principal of the share set apart for the said child as aforesaid, and to apply the income of the remaining half of each such share to the use of the said child, during his or

her life; and, upon the death of the said child, to convey, transfer and pay over the principal thereof to such persons or corporations and in such manner as the said child shall direct by his Last Will and Testament, or, in the absence of such direction, to such persons as shall then constitute the heirs at law of the said child, as in the case of the inheritance of real property, according to the laws of the State of New York."

Decedent, who had attained the age of forty years on December 28, 1919, exercised by Articles Twelfth and Sixteenth of his will the power of appointment given to him by the said Will of his father. By decree of the Surrogates' Court of the County of New York, dated January 12, 1939, it was determined that as to 6.667% of the trust created for the benefit of decedent by the said will of his father, the appointment in further trust under Article Twelfth of the Will of decedent was invalid, but that said 6.667% of said trust had been validly appointed by

8 Article Sixteenth of said Will outright in equal shares to decedent's widow, Pauline V. Hoving, his daughter, Millicent R. Balcom, and his grandson, Peter Salm. It was further determined by said decree that the appointment in further trust of one-third of the balance of said trust for the life of said Pauline V. Hoving and the appointment in further trust of an additional one-third of the balance of said trust for the life of said Millicent R. Balcom were valid. The interests which said widow and daughter of decedent took under the exercise by decedent of the power of appointment given to him by the Will of his father were less in amount than they would have taken as heirs at law of decedent under the Will of the donor of the power in the event the power had not been exercised.

Based upon the value of the property comprising said trust determined by the Commissioner of Internal Revenue in his said Notice of Deficiency, and after making adjustment for the additional deduction referred to in subdivision (b) of this paragraph, the amount thereof passing outright to each of said Pauline V. Hoving and Millicent R. Balcom under the appointment contained in Article Sixteenth of the Will of Henry H. Rogers is $187,427.91 and the values of their respective life interests in the trusts created under the appointment contained in Article Twelfth of said Will are as follows:

Pauline V. Hoving (born September 29, 1890)	$1,481,089.57
Millicent R. Balcom (born February 1, 1902)	1,732,956.80

Accordingly, the sum of $3,588,912.29, representing the aggregate value of the life estates of Pauling V. Hoving and Millicent R. Balcom and of the amount passing outright to

9 them, should be deducted from the value of the property comprising the trust created for decedent's benefit under the Will of his father and the value of such property to be included in the gross estate should be $4,841,128.45.

(d) The Commissioner of Internal Revenue has allowed as the deduction for attorneys' fees the sum of $310,000 and as the deduction for Executors' commissions the sum of $1,083,097.77, which amounts he determined had been paid. Upon information and belief, the total amount which will be paid by petitioners for attorneys' fees will be at least $25,000 more than the amount allowed by the Commissioner of Internal Revenue and the total amount which will be paid to petitioners for their commissions, pursuant to decrees of the Surrogate's Court of the County of Suffolk, will be at least $60,000 more than the amount allowed by the Commissioner of Internal Revenue. Accordingly, the amounts to be allowed as deductions for Executors' commissions and attorneys' fees are $1,143,097.77 and $335,000.00, respectively.

(e) On July 30, 1928, Bankers Trust Company having agreed to lend to 87th Street and East End Avenue Corporation the sum of $400,000 provided among other things that said corporation secured the guaranty of said loan by guarantors satisfactory to Bankers Trust Company, decedent executed and delivered a certain agreement of guaranty whereby he guaranteed to Bankers Trust Company payment of 6¼% of the principal and interest of any and all notes delivered to it by 87th Street and East End Avenue Corporation not in excess of said sum of $400,000. In consideration of decedent's guar-

10 anty, and similar guaranties of others, Bankers Trust Company loaned to 87th Street and East End Avenue Corporation the following amounts on the dates stated:

May 17, 1929	$150,000
June 6, 1929	200,000
July 10, 1929	50,000

and received promissory notes of said corporation in said amounts. On information and belief, the loan made as aforesaid on May 17, 1929, was reduced by a payment of $30,000 on November 16, 1934, and by a payment of $20,000 on September 30, 1936, and the date of payment of each of said notes was extended to October 1, 1938, pursuant to said agreement of guaranty. Upon information and belief, said notes were presented on October 3, 1938, to Doctors Hospital, Inc. (successor to said 87th Street and East End Avenue Corporation), for payment, which was duly demanded and refused, and notice of protest was sent to petitioners and the other guarantors. On October 18, 1938, petitioners made payment to Bankers Trust Com-

pany of the sum of $21,875 in full settlement of the obligation of the estate of said decedent under said agreement of guaranty, dated July 30, 1928. Petitioners are unable to collect any part of said payment made to Bankers Trust Company from Doctors Hospital, Inc., or 87th Street and East End Avenue Corporation. Accordingly, the amount of such payment should be allowed as a deduction.

(f) The Commissioner of Internal Revenue has allowed as credit for state estate, inheritance, legacy or succession taxes with respect to this estate the sum of $3,027,845.96. Such taxes will be paid in an amount equal to or in excess of 80% of the estate tax finally determined to be payable under the Revenue Act of 1926 and will be paid within the period required by law.

11 (g) Petitioners have made the following payments on account of the Federal estate tax with respect to the estate of said decedent:

May 18, 1936	$1,000,000.00
July 24, 1936	7,191,967.00
September 14, 1937	600,000.00

On July 24, 1939, a claim for refund of the sum of $1,505,398.64 was filed in the office of the Collector of Internal Revenue for the First District of New York.

Wherefore, the petitioners pray that this Board may hear this proceeding and determine that (1) the deficiency alleged in said Notice of Deficiency does not exist and (2) there has been an overpayment of Federal estate tax by petitioners in the amount of $1,505,398.64, which amount was paid by petitioners within three years before the filing of a claim for refund thereof.

JOHN W. DRYE, JR.,
John W. Drye, Jr.,
70 Broadway, New York City,
HAROLD A. DONEGAN,
Harold A. Donegan,
70 Broadway, New York City,
ARTHUR W. SIEGRIST,
Arthur W. Siegrist,
70 Broadway, New York City,
Counsel for Petitioners.

12 STATE OF NEW YORK,
County of New York, ss:

Adrian H. Larkin, being duly sworn deposes and says: That he is one of the duly qualified and acting Executors of the Estate of Henry H. Rogers, deceased, and is one of the peti-

tioners above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

ADRIAN H. LARKIN.

Sworn to before me this 13th day of September 1939.

[SEAL] EDWARD K. BACHMAN,
Edward K. Bachman,

Notary Public, New York County; N. Y. Co. Clk's No. 4, Reg. No. 0B185; Certificates filed in Bronx, Kings, Nassau, Queens, Suffolk and Westchester Counties; Bronx Co. Clk's No. 79, Reg. No. 206B40; Kings Co. Clk's No. 229, Reg. No. 331; Nassau Co. Clk's No. 42B40; Queens Co. Clk's No. 776, Reg. No. 3127.

Commission expires March 30, 1940.

STATE OF NEW YORK,
County of New York, ss:

Albert Stickney, being duly sworn, deposes and says: That he is one of the duly qualified and acting Executors of the Estate of Henry H. Rogers, deceased, and is one of the petitioners above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

ALBERT STICKNEY.

Sworn to before me this 13th day of September 1939.

[SEAL] EDWARD K. BACHMAN,
Edward K. Bachman,

Notary Public, New York County; N. Y. Co. Clk's No. 4, Reg. No. 0B185; Certificates filed in Bronx, Kings, Nassau, Queens, Suffolk and Westchester Counties; Bronx Co. Clk's No. 79, Reg. No. 206B40; Kings Co. Clk's No. 229, Reg. No. 331; Nassau Co. Clk's No. 42B40; Queens Co. Clk's No. 776, Reg. No. 3127.

Commission expires March 30, 1940.

13 STATE OF NEW YORK,
County of New York, ss:

C. L. Herterich, being duly sworn, deposes and says: That he is an officer, to wit: an Assistant Vice-President of Central

Hanover Bank and Trust Company, one of the duly qualified and acting Executors of the Estate of Henry H. Rogers, deceased, and one of the petitioners above named; that he is duly authorized by said Central Hanover Bank and Trust Company to verify the foregoing petition; that he has read the foregoing petition or had the same read to him, and is familiar with the statements contained therein; and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

C. L. HERTERICH.

Sworn to before me this 13th day of September 1939.

[SEAL] EDWARD K. BACHMAN,
Edward K. Bachman,

Notary Public, New York County; N. Y. Co. Clk's No. 4, Reg. No. 0B185; Certificates filed in Bronx, Kings, Nassau, Queens, Suffolk and Westchester Counties; Bronx Co. Clk's No. 79, Reg. No. 206B40; Kings Co. Clk's No. 229, Reg. No. 331; Nassau Co. Clk's No. 42B40; Queens Co. Clk's No. 776, Reg. No. 3127.

Commission expires March 30, 1940.

14 EXHIBIT A

Amendment to Petition

Office of Internal Revenue Agent in Charge, Brooklyn Division. Estate of Henry H. Rogers.

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
June 29, 1939.

CENTRAL HANOVER BANK & TRUST CO., ET AL., *Executors,*
70 Broadway, New York, New York.

GENTLEMEN: You are advised that the determination of the estate-tax liability of the above-named estate, discloses a deficiency of $849,524.19, as shown in the statement attached.

In accordance with the provisions of existing internal-revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Daniel A. Bolich, Internal Revenue Agent in Charge, for the attention of Estate Tax Section. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By DANIEL A. BOLICH,
Daniel A. Bolich,
Internal Revenue Agent in Charge.

Enclosures:
Statement.
Form or waiver.
MR/SG

15 MT-ET-8941-1st New York. Estate of Henry H. Rogers. Date of death—July 25, 1935.

STATEMENT

In the final determination of the estate's tax liability as herein reached, careful consideration has been given to the protest filed against the deficiency tax as disclosed in the preliminary letter to the executors dated May 4, 1938.

The matters placed in issue by the protest will hereinafter be specifically commented upon.

Changes as disclosed by the preliminary letter, against which no protest was filed, are herein adopted and made final, and will be fully reflected in the tax summary to be hereinafter set forth.

The protest relates to the following items:

GROSS ESTATE

Real estate	Returned	Tentatively determined	Determined
Item 1—Premises at Southampton, N. Y., known as "Port of Missing Men"	450,000.00	650,000.00	450,000.00

Based upon the record as now constituted it is felt that the amount as originally returned was a substantially correct valuation for this property as of date of death, and adjustment is made accordingly.

Stocks and Bonds			
Item 27—371 Shares Seaboard Sand & Gravel Corp., 8% Pfd. stock	0	37,100.00	18,550.00
Item 35—500 shares Standard Trap Rock Corp. Pfd	25,000.00	30,000.00	30,000.00
Item 37—890 shares 1005 Grand Ave. Corp	89,001.83	147,393.78	147,393.78
Item 38—100 shares Tuxedo Securities Corp	700.00	1,000.00	1,000.00
Item 46—94 shares Wyoming Land Co	7,050.00	24,440.00	15,745.00

Item 27 was deemed to be fairly worth $50 per share after a careful consideration of its balance sheet and operating statements.

Item 35 was fully gone into in connection with an award which this corporation has in its favor, and it was felt that the heretofore determined valuation of $60 per share for this stock was fair.

16 Item 37 was valued on the basis of one-half of a net worth figure of $294,787.57 reported in a balance sheet considered by an internal revenue agent of the St. Louis Missouri division. In arriving at the latter net worth figure the Missouri agent adopted a valuation of $298,950 for the land and building owned by the corporation, located at Kansas City, Mo. The evidence bearing on this item submitted with the protest was referred to the Missouri agent for his further attention, and the latter has renewed his recommendation of $298,950 for the corporation's Kansas City, Mo., realty holdings. No change in this item is accordingly deemed to be warranted.

Item 38 was deemed to be fairly worth $10 per share as explained at the conferences on the protest.

Item 46 is determined herein at $167.50 per share in conformity with the agreement reached with respect to this particular stock.

Mortgages, Notes, and Cash			
Items 11, 12, 13: London Accounts	2,439,658.46	2,834,159.06	2,834,479.06

The amount which the estate sought here to claim represents British death duties in connection with London cash accounts, but which duties are not properly deductible for Federal estate tax purposes. The protest in this particular connection is accordingly rejected. Showing was, however, made that the estate was entitled to a deduction of $363.54 representing British income taxes on income accrued prior to the date of decedent's death, and due credit will hereinafter be given for the item of $363.54, under Debts of Decedent.

Item 34: Accrued income	88,484.89	88,484.89	86,174.29

On consideration of the protest it developed that there had been inadvertently included in this fund, as accrued dividends, certain sums which were not taxable as dividends as of date of death, as follows: Bristol Myers Co., $122.40; Brooklyn Union Gas Co., $2,025; Life Savers Corp., $40.80; and Vick Chemical, Inc., $122.40; total $2,310.60. Adjustment is made accordingly.

Item 67:			
Notes of Francesco and Laura Rospigliosi (Principal)	0	21,000.00	0
Accrued interest Item 67	0	10,275.41	0

On the basis of the record as now constituted the estate's claim that these notes possessed no value as of date of death is sustained, and the principal of the notes, together with the previously determined accrued interest thereon, is now eliminated as a part of the decedent's gross estate:

17 Insurance			
Item 1: United States Government Life Insurance Policy #514,387	0	10,175.60	10,175.60

This policy was payable to the decedent's estate as the beneficiary thereof, and it constituted taxable insurance within the meaning of the Federal estate tax law and regulations. No charge is accordingly made in this item.

Other Miscellaneous Property			
New Item: Amount due under will of decedent's father	0	0	17,914.74

On consideration of the estate's protest it developed that the trust fund over which decedent had a general power of appointment, and which is returned as Item 1 of Schedule F, included the sum of $17,914.74 which had vested in the decedent outright at the age of 40. The latter sum is accordingly being withdrawn from Item 1 of Schedule F, and is herein being treated as being subject to inclusion under Schedule D-2 of the return.

Decedent's reversionary interest in trust fund under trust instrument dated December 31, 1928 (Noted in return as Item 8, Schedule E)	0	163,954.04	0
Decedent's reversionary interest in trust fund under trust instrument dated January 8, 1931 (Noted in return as Item 10, Schedule E)	0	27,832.84	0
Decedent's reversionary interest in trust fund under trust instrument dated August 24, 1933 (Noted in return as Item 11, Schedule E)	0	56,618.09	0

Upon further consideration it is now held that the decedent possessed no interest in the above referred to trust instruments subject to being included as a part of his gross estate for Federal estate tax purposes, and the previously determined amounts for these items are accordingly being withdrawn.

18	Powers of Appointment			
	Item 1; Under will of decedent's father, Henry H. Rogers, Sr., who died May 19, 1909	7,000,000.00	9,094,037.16	8,465,040.74

After a full consideration of the record as now constituted it is held that the trust fund here involved, over which decedent had, and exercised, a general power of appointment, is properly subject to being included as a part of the decedent's gross estate, under Section 302 (f) of the Revenue Act of 1926, and no change is accordingly being made from the determination heretofore reached with respect to this item, except as regards questions of valuation, as follows:

Gross value of Item 1, Schedule F, per preliminary letter of May 4, 1938			9,201,537.16
	Tentatively Determined	Determined on Protest	
94½ shares Wyoming Land Co.	24,570.00	15,828.75	
Federal, Municipal and other bonds	2,067,439.01	2,058,234.13	
Cash to which decedent was entitled outright, and transferred to "Other miscellaneous property" Sched. D-2	17,914.74	0	
	2,109,923.75	2,074,062.88	
Difference (minus)			35,860.87
Gross value Item 1, Sched. F as redetermined			9,165,676.29
Deductions:			
Attorneys' Fees per preliminary letter 5/4/38 (no change)	107,500.00		
Trustees' Commissions as now determined	520,708.48		
Guardians' Allowances as now determined	72,427.07		
Total deductions			700,635.55
Net value Item 1, Sched. F as redetermined			8,465,040.74

19 The Wyoming Land Company stock is adjusted at $167.50 per share in accordance with the agreement reached on these holdings in the conferences on the estate's protest.

As to the bond items, it is now felt that these securities were substantially correct as originally valued by the estate, in the aggregate amount of $2,067,439.01, and adjustment is herein made accordingly.

The protest also raised a question as to the values for stock items described as 204 shares Bristol Myers Co.; 1,620 shares Brooklyn Union Gas Co.; 102 shares Life Savers Corp.; and 204 shares Vick Chemical, Inc. The tentatively determined values were on the basis of the mean between the high and low

sales on the New York Stock Exchange, and no change is warranted with respect to these items under the instant heading. The estate was, however, entitled to relief with respect to certain dividends erroneously returned in connection with these particular shares of stock, due allowance for which, however, has hereinbefore been given, in connection with accrued income item #34, of Schedule C of the return.

With respect to the cash item of $17,914.74 noted in the above tabulation, this is now being eliminated from the instant schedule since it properly belongs under "Other Miscellaneous Property," and under which heading it has hereinbefore been included.

The Attorneys' Fees chargeable against this trust fund as heretofore determined were not in issue on the protest. However, as regards the Trustees' Commissions and Guardians' Allowances, for which no deduction was provided in the preliminary letter, the evidence now of record is to the effect that the trustees actually received payments on February 20, 1939, aggregating $355,420.54, and that they will, with reasonable certainty, receive further payments aggregating $165,287.94, making a total in that connection of $520,708.48; also, that on February 20, 1939, there was a payment of $37,427.07 as a Special Guardians' Fee, and one of $35,000 as a General Guardian's Fee. Adjustments are herein made accordingly.

DEDUCTIONS

Funeral Expense (New Item)			0	0	300.00

To allow for a charge of $300 incurred and paid for an autopsy.

Executors' Commissions	976,960.35	938,895.95	1,083,097.77	

The determined amount is the aggregate of the commissions as adjudicated in connection with executors' accountings, and as actually paid, to date.

20 Attorneys' Fees	400,000.00	250,000.00	310,000.00	

The determined amount is the total of the attorneys' fees as paid to date.

Miscellaneous Administration Expenses: Additional items			0	0	33,066.66

The evidence now of record indicates that the estate is entitled to a deduction of $674.39 for attorneys' disbursements paid October 1, 1937; $156.34 for further attorneys' disbursements paid October 28, 1938; $27,735.93 for praperty maintenance expenses for the period from September 1, 1937, to August 1, 1938, and $4,500 for Special Referee and Guardian's

allowances paid January 4, 1939, making a total of $33,066.66 as the additional amount deductible under this hearing.

Debts of Decedent:			
Item 258	45,753.04	0	44,850.98
Additional Claims:			
a—Income tax on foreign accounts	0	0	363.54
b—Deficiency Federal Income Tax—1934	0	0	49,888.79
c—Federal Gift Tax—1934	0	0	28,584.10
d—Federal Gift Tax—1935	0	0	339.08
e—New York Income Tax Deficiency—1934	0	0	5,379.13
f—Mercer—services	0	0	765.68
g—Wako lease	0	0	1,575.03
h—Dr. Berglund	0	0	2,323.00
i—Dr. Cole	0	0	2,000.00
j—Holland & White, Inc	0	0	76,500.00
k—Murray & Fregurtha	0	0	18.65
l—Dr. Stetson	0	0	6,500.00
m—Marie Zimmerman	0	0	950.00
n—Frederick Yardley	0	0	193.00
o—David Bookstaver	0	0	50.00
p—Andrew Kennely, Inc	0	0	125.00
q—Emslie & McWilliams	0	0	456.00
r—P. L. Behrendt	0	0	1,000.00
s—Rent Southampton	0	7,800.00	13,648.05
t—Anne Watson	0	0	22,930.12
u—Suffolk County Council	0	0	2,000.00
v—Deficiency Federal Income Tax—1935	0	0	49,076.37
w—Loan guaranty	0	0	0

Except for those claims designated (s), (t), and (w) the debts of decedent as above tabulated are now allowed in the sums in which these items have been definitely determined and paid by the executors, according to the evidence now of record. For further reference to Item (a) see explanation in connection with Items 11, 12, and 13 under "Mortgages, Notes and Cash."

21 The determined amount for Item (s), which is a liability under a building lease, is predicated upon an annual rent liability of $3,600 per annum, less a sub-rental of $360 per annum net loss $3,240, for a period of 5 years, discounted at 6%.

Item (t), which is a claim against the decedent's estate, by one Anne Watson of $4,000 for her life, is now deemed to constitute a deductible claim for Federal estate tax purposes, and is herein allowed on the basis of a factor of 5.74003, the claimant having been born on May 4, 1863, and was around the age of 72 at the time of decedent's death.

Item (w), which is a claim for $21,875 in connection with a loan by the Bankers Trust Company to the 87th Street and East End Avenue Corporation, which the decedent guaranteed, is disallowed inasmuch as it was not felt that this indebtedness

had been incurred or contracted bona fide and for an adequate and full consideration in money or money's worth, within the meaning of Section 303 (a) (1) of the Revenue Act of 1926, as Amended.

In view of the foregoing the Federal estate tax liability of this estate is finally determined as follows:

	Determined in P/L	Determined on Protest	
Gross estate per preliminary letter May 4, 1938			27,158,970.04
Schedule A, Item 3	650,000.00	450,000.00	
Schedule B, Item 27	37,100.00	18,550.00	
Schedule B, Item 46	24,440.00	15,745.00	
Seshedule C, Item 34	88,484.89	86,174.29	
Schedule C, Item 67	21,000.00	0	
Schedule C, Item 67 (Int.)	10,275.41	0	
Schedule D–2, New Item	0	17,914.74	
Schedule D–2, Revisionary interests originally referred to in the return as:			
Item 8, Schedule E	163,954.04	0	
Item 10, Schedule E	27,832.84	0	
Item 11, Schedule E	56,618.09	0	
Schedule F, Item 1	9,094,037.16	8,465,040.74	
	10,173,742.43	9,053,424.77	
Difference (minus)			1,120,317.66
Gross estate as herein determined			26,038,652.38
22 Total deductions 1926 Act per preliminary letter			2,794,775.31
Funeral Expenses (New Item)	0	300.00	
Executors' Commissions	938,895.95	1,083,097.77	
Attorneys' Fees	250,000.00	310,000.00	
Misc. Admi. Exp. (New Items)	0	33,066.66	
Debts of Decedent—Item 258	0	44,850.98	
Debts previously in dispute, and herein discussed as claims (a) to (w), inci	7,809.00	264,695.54	
	1,196,695.95	1,736,010.95	
Difference (plus)			539,315.00
Total deductions 1926 Act as herein determined			3,334,090.31
Gross estate as determined			26,038,652.38
Total deductions 1926 Act as determined			3,334,090.31
Net estate 1926 Act as determined			22,704,562.07
Net estate 1932 Act as determined			22,754,562.07
Gross tax 1926 Act as determined			3,894,412.41
Credit for estate or inheritance tax			3,027,845.96
Net tax 1926 Act			866,566.45
Total gross taxes 1926–1932 Acts		12,069,337.24	
Gross tax 1926 Act		3,894,412.41	

Gross additional tax	8,174,924.83
Net additional tax	9,041,491.28
Amount shown upon return as tax	8,191,967.09
Deficiency tax as determined	849,524.19

The deficiency bears interest at the rate of six percent per annum from one year after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

It will be noted that credit of $3,027,845.96 has been allowed against the tax under the 1926 Act, an account of State estate or inheritance tax disclosed to be due upon this estate. A further credit of $87,683.97 will be allowable herein, provided that there is furnished the evidence required in that connection under Article 9 of Estate Tax Regulations 80. If this further credit is allowed the net deficiency tax will be $761,840.22.

32 If a waiver therefor, together with the above referred to additional credit proof, is furnished within ninety days from the date of this letter, $761,840.22 of the deficiency will be assessed. Otherwise, if upon the expiration of ninety days from the date of this letter if a petition has not been filed with the Board of Tax Appeals, the full deficiency of $849,524.19, as herein determined, will be assessed.

24 United States Board of Tax Appeals

Docket No. 106026

ESTATE OF HENRY H. ROGERS, DECEASED, ADRIAN H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTORS, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Received November 6, 1939. U. S. Board of Tax Appeals.

Answer

Now comes the respondent by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled case, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2.

3. Admits that the taxes in controversy are Federal estate taxes of Henry H. Rogers, deceased, and that the amount of the deficiency proposed by the respondent is $849,524.19, but denies the remaining allegations of paragraph 3.

4. Denies the respondent's determination of decedent's estate tax liability is based upon the errors alleged and set forth in subparagraphs (a) to (g), inclusive, of paragraph 4.

5 (a). Admits that respondent has valued 890 shares of capital stock of 1005 Grand Avenue Corporation at date of decedent's death on July 25, 1935, at $147,393.78, but denies the remaining allegations of paragraph 5 (a).

25 5 (b). Admits that respondent has allowed as a deduction for attorneys' fees from the value of the property, comprising the trust created under the will of decedent's father over which decedent exercised a power of appointment, the sum of $107,500.00, but denies the remaining allegations of paragraph 5 (b).

5 (c). Admits that decedent's father, Henry H. Rogers, Sr., died on May 19, 1909, leaving a last will and testament which was duly admitted to probate in the Surrogates' Court of New York County on May 28, 1909; admits that Article 8th of said will provides in part as alleged and set forth in paragraph 5 (c) of the petition; admits that decedent attained the age of forty years on December 28, 1919, and that he exercised the power of appointment given to him by the will of his father, but denies the remaining allegations of paragraph 5 (c).

5 (d). Admits that the respondent has allowed as deduction for attorneys' fees the sum of $310,000.00 and for executors' commissions the sum of $1,083,097.77, but denies the remaining allegations of paragraph 5 (d).

5 (e). Denies the allegations contained in paragraph 5 (e).

5 (f). Admits that respondent has allowed as credit for State estate, inheritance, legacy, or succession taxes with respect to decedent's estate the sum of $3,027,845.96, and respondent accepts the assuring statements contained in paragraph 5 (f) that "such taxes will be paid in an amount to or in ex-

26 cess of 80% of the estate finally determined, etc.," and respondent will and stands ready to allow decedent's estate the full amount of said credit allowed by law upon submission of proof that the amount finally determined to be due has been paid.

5 (g). Admits that this estate paid estate taxes in the amount of $1,000,000.00 on May 19, 1936 the sum of $7,191,967.09 on July 24, 1936, and deposited an additional $600,000.00 with the Collector of Internal Revenue, First New York District, on

September 16, 1937; and admits that on July 24, 1939, a claim for refund of $1,505,398.64 in Federal estate taxes was filed on behalf of this estate with the Collector of Internal Revenue for the First District of New York.

6. Denies generally and specifically each and every allegation contained in taxpayer's petition, not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that taxpayer's appeal be denied.

J. P. WENCHEL,
E. C. A.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of counsel:
E. O. HANSON,
Division Counsel.
W. FRANK GIBBS,
Special Attorney,
Bureau of Internal Revenue.
jh 10-31-39

27 Official Report of Proceedings Before the U. S. Board of Tax Appeals

Docket No. 100026

ESTATE OF HENRY H. ROGERS, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

United States Board of Tax Appeals, June 10, 1941.

Hearing at New York, N. Y.
Date June 5, 1941.

28 Before the United States Board of Tax Appeals

Docket No. 100026

ESTATE OF HENRY H. ROGERS, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

UNITED STATES CUSTOMS COURT,
201 VARICK STREET,
New York, N. Y., June 5, 1941.

(Met pursuant to notice.)

Before Hon. J. EDGAR MURDOCK, Member.

Appearances: Arthur W. Siegrist, Esq., 70 Broadway, New York, N. Y., appearing for the Estate of Henry H. Rogers, the Petitioner. W. Frank Gibbs, Esq., 90 Church Street, New York, N. Y., appearing for the Commissioner of Internal Revenue, the Respondent:

29 *Proceedings*

The CLERK. Docket No. 100026, Estate of Henry H. Rogers.

Mr. GIBBS. If your Honor please, Mr. Siegrist who appears here this morning on behalf of the Petitioner has asked me to make a statement as regards the case as we have only one issue to present to your Honor, all the others having been settled. This case involves an estate tax liability of Henry H. Rogers who died July 25, 1935.

The Commissioner, on June 29, 1939, mailed a deficiency notice to the executors of his estate proposing a deficiency of $849,524.19. In the deficiency notice the Commissioner made a finding that the amount of the net estate under the Revenue Act of 1926 was $22,704,562.07 and the amount of the net estate under the Revenue Act of 1932 was $22,754,572.07.

Included in the aforesaid determination the Commissioner included as a part of the net taxable estate an item representing property passing under the general power of appointment which decedent exercised in his last will, the power of appointment having been given to him by his father who died in 1909.

In filing the estate tax return these Petitioners as executors of the estate included the property passing under
30 power at a value of $7,000,000. In the deficiency letter the Respondent determined the value of the property dated at decedent's death to be $8,465,040.74.

The larger part of the proposed deficiency in this case is due to the Commissioner's increased valuation on this property passing under power.

In the petition filed with the Board there have been many assignment of errors raised with respect not only to the issue involved with regard to the value of the property passing under power but many other issues.

In trying to get this case ready to present to the Board, counsel have labored trying to settle all issues except this

one involving property passing under power and we have done so.

In the consideration of these matters certain affirmative issues which the Respondent contemplated raising before the Board were discussed and considered and we have also reached a settlement on all of those issues although we have not pleaded by way of amending the answer and raised any of these affirmative issues.

I would like to read from a certain paragraph of the stipulation which we have entered into.

Paragraph 12 of the stipulation which will be offered reads as follows:

"The net value at the date of decedent's death of the property in trust created under Colonel Rogers, Sr.—"
31 he is the father of this decedent who died in 1909 where he willed for the benefit of the decedent amount of $8,428,949.60.

The value of decedent's net taxable estate exclusive of the value of the property in said trust amounts to $14,592,436.20 under the provisions of the Revenue Act of 1926 and $14,642,436.20 under the provisions of the Revenue Act of 1932 as amended by the Revenue Act of 1934.

It is further agreed that if all of the property in said trust is held to be includable in decedent's net taxable estate, the net taxable estate of the decedent under the Revenue Act of 1926 and Revenue Act of 1932 as amended by the Revenue Act of 1934 amounts to $23,021,385.80 and $23,071,385.80 respectively.

Those agreed figures give effect to a settlement of the parties on all the issues raised in the petition and also such affirmative issues that we considered in the conferences preparatory to getting this case ready for trial.

Paragraph 13 of the stipulation reads:

"It is also agreed by Petitioner and Respondent that the Board enter its decision under Rule 50 in accordance with the facts herein stipulated determining an overpayment or
32 correct deficiency to be assessed regardless of whether the amount of the deficiency is larger than the amount of the deficiency proposed by the Respondent in his deficiency notice of June 29, 1939."

Respondent in presenting this stipulation at the hearing before the Board makes claim for any increased deficiency. In other words, we have settled all issues except this question of what is to be included in the decedent's estate by reason of the exercise of the power and the property passing under the power.

I would like to have your Honor's observation on the procedure here as to whether or not you want us to file an amended answer as we have settled everything except this one issue.

The MEMBER. If you are satisfied, I will be.

Mr. GIBBS. I might say the sole dispute is with regard to the property passing under power. Before the property is included goes in the taxable estate then the net taxable estate is larger than was determined in the deficiency letter and there will be an increased deficiency. However, under the petition of the Petitioner, if certain portions of this property is omitted under the passing of the power, the net taxable estate will be much less than as determined in the deficiency letter and there will be quite a substantial refund.

The MEMBER. I think that will be satisfactory
33 from my standpoint.

Mr. GIBBS. With respect to the question that we are presenting to the Board for decision, the facts briefly are these: Colonel Rogers, this decedent's father, died in 1909 and in his last will created trusts in favor of his four children one of whom was this decedent.

In accordance with the terms of his will he provided that the income from the trusts to each child shall be paid to that child for life and upon the child attaining the age of 40 years, one-half of the corpus in the trust for that particular child would be distributed outright to that particular child. The trust after the child became 40, the balance was still to be paid for life to that child and upon his death there was given the general power of appointment over the property in the trust at that time.

This decedent reached the age of 40 in the year 1919 and at that time one-half of the trust corpus in his trust was distributed and paid over to him. This decedent died July 25, 1935, and in his will he exercised the power.

Colonel Rogers, Sr.'s will provided that if the power was not exercised the property would go to the then heirs of
34 the deceased child in accordance with the laws of the State of New York involving the transfer of real estate.

In exercising the power, Colonel Rogers set up three trusts. One-third of the appointed property was put in trust, the income to be paid to his then widow for life or until she remarried and if she remarried one-half of the corpus of her trust was to be paid to the decedent's daughter Millicent Rogers. Another third was left in trust for the life of Millicent, his daughter, the income to be paid to her for life, and there were certain dispositions made upon the death of the life beneficiary.

The other third was left to a child of Millicent named Peter Salm, the income to be paid to him for life.

After Colonel Rogers died there was litigation occurred over his estate and there was not a final accounting. The trustees under the old man's will—I refer to him respectfully—until 1939, and in 1939 the final accounting of the trustees were made and it is quite involved and we have a copy of that order in exhibit in the stipulation and I will not attempt to go into it now because it is very much involved because of the various holding in respect to the various holdings of the property.

Thus it is the Respondent's position in this case that
35 all of the property passed under the power. It's the position of the Petitioners, if I may state it, that they say that all of the property that went to Peter Salm in the exercise of the power did pass under the power but they say the fact that Mrs. Rogers, the widow, and Millicent, being heirs of the decedent, would have taken a larger estate if the power had not been exercised; that the value of their life estate should be carved out of the larger estate and that did not pass in the power.

There are many decisions recently on this question. I hope to distinguish some of them and we have some arguments in regard too, if the Board follows those decisions. We contend that Millicent in any event by reason of the fact that the widow remarried, got a larger estate under the power than she would have gotten if the power hadn't been exercised.

Mr. SIEGRIST. Your Honor, Mr. Gibbs has stated the point of the case in great detail. I would like to say that the executors of Colonel Rogers' estate have paid $8,800,000 in Federal estate taxes and if the Respondent's contention here prevails there will be a deficiency of approximately $300,000 more. If the Petitioners are successful there will be an overpayment of approximately $1,300,000.

As Mr. Gibbs has stated, our position is that the widow
36 and daughter of Colonel Rogers received from this appointed estate less than they would have received if the power had not been exercised and under two decisions of the Circuit Court of Appeals and three decisions of the Board of Tax Appeals we believe that the property which they received, that is, the widow and the daughter from this appointed fund, is not to be included in the gross estate of the decedent.

Mr. GIBBS. We have an agreed stipulation.

The MEMBER. You may file the stipulation. Do you want to file briefs?

Mr. GIBBS. Yes, sir.

The MEMBER. In accordance with the Board's rules?

Mr. GIBBS. I would like to have the Petitioners file their brief and Mr. Drye said he would like 30 days after, approximately, to file his brief. This is one of the cases I have to brief before I take over my new duties and I would like 30 days.

The MEMBER. Is that satisfactory?

Mr. SIEGRIST. Yes.

The MEMBER. Petitioner will file his brief in 30 days and Respondent 30 days after that and Petitioner 15 days later to reply.

Hearing closed.

37 United States Board of Tax Appeals

Docket No. 100026

ESTATE OF HENRY H. ROGERS, DECEASED, ADRIAN H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTORS, PETITIONERS.

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Arthur W. Siegrist, Esq., for the petitioner.
W. Frank Gibbs, Esq., for the respondent.

Memorandum Opinion

MURDOCK. The Commissioner determined a deficiency in estate tax in the amount of $849,524.19. A number of issues have been settled by agreement of the parties and incorporated in their stipulation. The facts have been stipulated, and the stipulation in its entirety, together with the exhibits attached thereto, is adopted as the Board's Findings of Fact.

The decedent died in 1935 testate in New York. His father had died in 1909. The will of the father which was probated in New York created a trust for the benefit of the present
38 decedent. The latter was given a power of appointment by will over one-half of the trust property, and if he failed to appoint, that property was to go to his heirs at law, in accordance with the laws of the State of New York relating to inheritance of real property. The son's heirs at law at the time of his death were his widow, his daughter, and his son. He exercised the power of appointment in such a way that, as construed by the New York courts, 6.667 per cent of the trust property went outright in equal shares to his widow, his daughter, and a grandson. The balance of the property was validly appointed one-third in trust for the benefit of the widow, one-

third in trust for the benefit of the daughter, and the remaining one-third outright to the grandson. The grandson's share is concededly within the gross estate. The figures are not in dispute. The value of the property over which the decedent had a power of appointment was at the time of his death $8,428,949.60. The value of the property passing to the widow and the daughter under the power was $3,640,122. The value of the remaining property passing under the power was $4,788,837.60. The $3,640,122 which went to the widow and daughter under the power was less than they would have gotten had there been no exercise of the power. The petitioner contends, therefore, that no property passed to those two under the exercise of the power by the decedent and it was error to include in the value of the gross estate of this decedent the value of the interests which the widow and daughter received. That is the only issue for decision by the Board.

The petitioner argues that the Board and two Appellate Courts have held that property received by an appointee
39 does not pass under the exercise of the power, and the value thereof may not be included in the gross estate of the donee of the power where the appointee received less under the exercise of the power than he would have received under the instrument creating the power in default of any exercise of the power, i. e., in such case the exercise of the power merely cuts down the estate of the appointee and nothing passes to him under the power. The cases relied upon are Estate of Gertrude Bucknell Day, 44 B. T. A. 524; Legg's Estate v. Commissioner, 114 Fed. (2d) 760; Rothensies v. Fidelity-Philadelphia Trust Co., 112 Fed. (2d) 758; James C. Webster, et al., Executors, 38 B. T. A. 273; and Lewis Spencer Morris, et al., Executors, 39 B. T. A. 570. The respondent concedes that if those cases apply, the computation of the petitioner is correct. The respondent first argues that the cases have been incorrectly decided, but we are not disposed to reopen the subject. He next attempts to distinguish the present case, but we think it is not distinguishable. Finally, he suggests that the property should be included in the gross estate of the decedent under section 302 (a), but concedes that Helvering v. Safe Deposit & Trust Co. of Baltimore, 121 Fed. (2d) 307, certiorari granted Oct. 27, 1941, holds to the contrary. The question was not raised by the pleadings. Even if it were, the respondent admits that he has no authority for his position. We hold, following the above cited decisions of the Board and the Courts, that there should be included in the gross estate of the decedent only $4,788,827.60 of the property subject to the power of appointment.

Decision will be entered under
Rule 50.
Enter:
Entered: Dec. 20, 1941.

40 Official Report of Proceedings Before the U. S. Board of Tax Appeals

Docket No. 100026

ESTATE OF HENRY H. ROGERS, ETC. PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

United States Board of Tax Appeals, May 5, 1942.

Hearing at Washington, D. C.
Date March 18, 1942.

41 United States Board of Tax Appeals

Docket No. 100026

ESTATE OF HENRY H. ROGERS, ETC., PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Reporter's Minutes

Hearing at Hearing Room No. 2, Internal Revenue Building, Washington, D. C., on Wednesday, the 18th day of March, 1942, at 9:30 o'clock a. m.

The above-entitled proceedings came on for hearing on this, the 18th day of March 1942, before the Honorable J. Edgar Murdock, Member of the United States Board of Tax Appeals, at Washington, D. C., pursuant to notice of hearing heretofore given; whereupon, the following proceedings were had, to wit:

Appearances: James C. Maddox, appearing on behalf of the Commissioner of Internal Revenue, Respondent. John W. Drye, Jr., for Petitioner.

42 *Proceedings*

Mr. DRYE. Your Honor, we filed a recomputation under Rule 50 of the amount of the overpayment of tax under your decision in this case.

There is no dispute between ourselves and the Government as to the correct tax liability under your decision.

Our computation shows an overpayment of $1,341,102. The petition which respondent has filed show $600,000 less.

I understand they object to your considering as payment $600,000 which was paid to the Collector of Internal Revenue, without assessment of tax, during the course of the audit of the Estate Tax Return.

It seems the Estate Tax Return was filed in 1936 and an audit was made in 1937, during which the Government indicated they were going to impose a large deficiency, which they subsequently did, which gave vise to the case before you.

On September 15, 1937, a $600,000 check was sent to the Collector with a letter stating that payment was made on account of additional estate tax liability under this return. The check was collected and is returnable, and there is no question but what the payment was made. It was stipulation of facts filed at the time the case was submitted.

I am not sure that I understand exactly what the Government's position is. I think they are worried about
43 the question of whether we are entitled to interest. I don't think they dispute the fact that we are entitled to get the money back. I understand that this Board has usually held that it does not determine questions of interest, but is duty under Section 322 (a) is to determine the amount of overpayment of tax.

The stipulation resited that petitioner has made the following payments. I am reading from the stipulation of facts.

"Petitioners have made the following payments on account of Federal Estate Tax with respect to decedent's estate; May 18, 1936, $1,000,000; July 24, 1936, $7,191,967.09; and September 14, 1937, $600,000 (this last payment has not been assessed, and is held in the Collector's office known as 'Unidentified Accounts')."

My concern about the matter is the provision of Section 322 (a) which says:

"Overpayment Found by Board.—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer.
44 No such credit or refund shall be made of any portion of the tax unless the board determines as part of its decision that such portion was paid (1) within three years

before the filing of the claim or the filing of the petition, whichever is earlier, or (2) after the mailing of the notice of deficiency."

I think the Government's position is they would like to give us the money back, but they want to give it back to us without interest, and I am just a little bit afraid, under that language, what we are entitled to get back is what the Board says we paid in excess of what the tax liability is.

Now that question has arisen very directly in Standard Portland Cement Company v. Commissioner, in the Third Circuit. In that case there had been a voluntary payment and there was a question of deficiency, and the Third Circuit says—this is a comparatively recent case in 80 Federal Second.

The MEMBER. I know all about that case. It is my case. I think they were wrong in that case. I think that brings up a different proposition. The Point there that I was concerned about, when it was argued before me, was whether the Board was determining a deficiency as of the time it wrote the order, or whether it was reviewing a determination made by the Commissioner at some prior time, and at that time we did not have the same provisions to rely on that we have now. It was my view that what the parties did after the Commissioner determined the deficiency was none of my concern, and I did determine that the Commissioner had correctly determined the deficiency, and then had allowed the parties to adjust any financial transactions they had since. I had the duty of determining what the correct deficiency was. The Court, however, said I was wrong, and said that in my decision I would have to speak as of the time I wrote it, and at that time there had been a payment.

Now, I think the whole hitch in that case was they had to get interest on the payment or not. That is what they were talking about, and it seemed to me, as you said, that the interest is no concern of mine. I still think that is true. But the payment in that case had been made in a way that did not seem to me to be in agreement with the statutory language. I do not believe that case has much to do with the case now before us. Under the statutory provision, before refund is made, the Board has to consider payments made at a certain time.

Now, I think it is my duty, under the statute, to determine the payment, and as you said, it would seem to me that payment had been made, regardless of how the Collector chose to treat it on his books. I think I would have to say that payment had been made, but if you have about covered your

part of it, let us see what Mr. Maddox says, and so
46 maybe we can get closer to the differences.

Mr. MADDOX. The test, as Mr. Drye has said, narrows down to the question of whether this $6,000,000 payment made on September 15, 1937, was made on account of tax or not. The importance of it in this case is this:

It is true the Board has jurisdiction of overpayments, and it does not have jurisdiction over interest, under its own decisions; but, if the Board finds this to be overpayment, it naturally follows, as a matter of law, that interest will have to be paid. That is the thing that makes it important in this case—whether it should be found as overpayment, on amount of this size, with interest at 6% amounts to considerable money, and it is important.

Now, the situation is this: The decedent died in 1935. The tax, under the Statute as amended, was required to be paid within 15 months of the date of death, as I understand the statute.

If I correctly compute it the tax was due not later than October 15, 1936, in this case, and the record shows that the return filed July 24, 1936, showed a tax liability of $8,191,967.09.

The amount paid on May 18, 1936, was $1,000,000, and in July 24, 1936, that is the date the return was filed, the balance was $7,191,967.09. That is the tax liability as disclosed by the return of this taxpayer, at the time it was due.
47 Now, Mr. Drye says, and this record does not disclose, and I don't know why, at the time the taxpayer walked into the Collector's office; and paid $600,000 in September 15, 1937, when the return was in process of audit and report. However, on that day the Commissioner had made no determination, and had made no preliminary indication as to whether he was going to find a deficiency, or overpayment, or what not. At that time the tax was more than a year due, that is, it was more than a year past due, I should say. So that $600,000 if it was paid as tax, seems to me to have been segregated as a tax and interest. There was interest due, but there has been no segregation. There has been no admission that he owed $600,000. At that time, as a matter of fact, this record discloses he never has admitted $600,000 due. They have been claiming overpayment.

So that this record discloses the $600,000 was not paid as interest, was not paid as tax on interest. I don't know why it was paid. It was simply taken to the Collector's Office, and given to the Collector, and it must be treated simply as a deposit, and comes into the possession of his office——

The MEMBER. You agree, Mr. Maddox it was understood by both parties, it related to this estate.

Mr. MADDOX. Well, I take it this money was paid into his office and they were, perhaps, given a receipt but the Collector put this money into "unidentified accounts." That is the only place he could put it.

48 The MEMBER: He did not have any thought that it was a payment made by somebody else. He knew it was for this particular taxpayer. There was no question about which taxpayer it related to.

Mr. MADDOX. No; I wouldn't say so. From the standpoint of the Government, there is nothing on the Collector's books that it was for account of this taxpayer.

The MEMBER. I understand.

Mr. MADDOX. There was no contention either by the Collector or Commissioner that this payment into the Collector's office was tax or tax and interest. There was no preliminary determination until March 4, 1938. That is the first my record discloses any communication was sent to the taxpayer suggesting any deficiency in this case.

Immediately upon mailing of that letter, and its receipt by the taxpayer, there was a contest, substantially the same as results from the decision in this case, your Honor.

The notice of deficiency was mailed June 30, 1939, and there was also, as the record discloses, a claim filed July 24, 1939.

Now, there has been no indication that the Commissioner has conceded, in any manner, that this amount was paid, or accepted as payment of tax. There wasn't any tax liability due. There was none determined. The stipulation says this

49 $600,000 paid on September 14, 1937, has not been assessed, and is held in the Collector's office in an account known as "unidentified accounts."

The MEMBER. When did the Commissioner make determination that some additional tax was due?

Mr. MADDOX. May 4, 1938.

The MEMBER. May 4?

Mr. MADDOX. Yes, sir; May 4. That was some seven months later after payment.

The MEMBER. Then he determined there was additional deficiency in excess of $600,000?

Mr. MADDOX. That is true.

The MEMBER. Suppose the Commissioner had been sustained in that, Mr. Maddox, wouldn't the Commissioner be foreclosed from trying to collect interest on $600,000, except up to the date of payment? In other words, the date that

the $600,000 was received by the Collector, wouldn't that be the last day upon which the Commissioner could compute any interest, so far as the $600,000 up to the date of payment would call for additional payment of that amount for that interest. In other words, $600,000 does not specify there is due on that particular date $600,000 plus interest.

The MEMBER. I understand that the Commissioner can collect interest from the date that the tax was due to the date that the check was received by the Collector.

Mr. MADDOX. That is on the $600,000?

50 The MEMBER. That is right.

Mr. MADDOX. And then interest on the balance from that date up to the date of payment.

The MEMBER. But I think there would be some indication that this would have to be regarded as a payment of tax, but there was no tax fixed at the moment. The taxpayer has not admitted the tax by showing it on his return, and the Commissioner has not determined it, but having received the money, if he later determines the deficiency, it seems to me, his books would have to show it. I don't see how he can do that sort of thing unless the statute gave him express authority.

Now, there was some payment in the Standard Portland Cement Company case——

Mr. MADDOX. There was a different proposition in that case. They filed a waiver with respect to the assessment of the tax, and all interest would stop 30 days after the waiver.

The MEMBER. My thought was that the waiver was not filed at the time when they did have the right to file any waiver.

Mr. MADDOX. That is true. As I recall it the waives was conditioned on the acceptance of the order by the Commissioner.

The MEMBER. As I understand you, there is no statutory provision that completely defines the question here.

51 The question here is simple. The taxpayer comes in, following filing of the return, showing a certain tax due, and makes payment on that tax, and when the Commissioner has not yet determined whether any more tax is due, the taxpayer comes in and says "Here is $600,000. I anticipate you may say I owe some more tax. Here is $600,000."

The Collector say, to himself at least, there is nothing for him to do with the $600,000 at the moment, because the Commissioner has not determined if there is any more tax due. Even if after that the Commissioner determines deficiency in a greater amount, the taxpayer concedes it and says if the actual tax liability is less than the amount due, the estate should have the funds returned. Is that true?

Mr. DRYE. Yes.

The MEMBER. If it is found to be less than you showed on your return.

Now, we are arguing about what is the statute on this $600,000 which was paid over to the Collector in the meantime, and as you say, there is no particular statutory provision which relates to interest settlements on the payment of a tax which was not due. If it was not a payment of tax, because there was no tax due, if it was not a payment of tax, it seems to me it would be important here to know what it was, be-
52 cause if it would be a payment of tax, when the Commissioner determined the deficiency, I should think it surely became a payment of tax at that time at least for the purpose of stopping interest on the unpaid tax at that time, to the extent of that amount, and that being so, I wonder why I would not have to say that it was payment, so that the taxpayer would get his relief on that basis. I understand that this probably would carry interest with it, even though that is no direct concern of ours. But, it seems to me that the statute says "payment of tax", and I think it would have to be regarded as a payment of tax, even though the Collector at the time was not able to credit it against any assessment.

Mr. MADDOX. May I point out one thing?

The MEMBER. Go ahead on anything you like. I was just thinking out loud, so you could help me.

We had a case here the other day, there was one presented here, where after the Board had determind that there was a deficiency, and in anticipation of appealing, the taxpayer came in here and paid—he did not come in here, he went to the Collector and paid the amount of the tax, and the Circuit Court affirmed the Board.

Now, he comes back here and wants the Board to vacate its decision, which has been affirmed, and hold that there is an overpayment of tax. Of course, the testimony is there
53 was an overpayment, and the Commissioner say he will give him the money back without interest, because he had no business to pay it. If there was no deficiency. If the Board determined there was no deficiency they cannot get interest from the government, if they are putting their money in here, because the Board has no jurisdiction over interest. That may be wrong, but as far as I can see you have a very different situation here because the taxpayer, although he made voluntary payment in this case, as was done in the other case, in this case later the Commissioner had determined that an additional tax was due, and it seems to me that was very helpful to the taxpayer. If the Commissioner had never deter-

mined that any additional tax was due, and the taxpayer had gone into the district court and sued for a refund, then I would be puzzled to know how it would collect this $600,000; because in that case there would be nothing to support it at all; but the fact is that when the Commissioner determined deficiency, it seems to me; if he would determine this as deficiency, he would credit some further payment on it. Now, I may be wrong.

Mr. MADDOX. But the Commissioner still may make assessment and collection of the tax, while this proceeding is going on, and simply because the taxpayer came in and paid $600,000—I don't know, perhaps he would have to assess it.

The MEMBER. I suppose the Commissioner could
54 make an assessment, even if the taxpayer came in and made a voluntary payment. Could the Commissioner receive payment of the tax, even though there was no determination on it?

It is a very interesting question, but I think it would strike me, at the moment—it would be very technical to say, after the Commissioner had determined that an additional amount was due, at which time he had $600,000 in his hands, that he would not have to say, "Well, I have not assessed it and I cannot assess it and yet he made voluntary payment, and he will have a payment for all purposes, this payment is to obviate and it will stop interest, if later it is determined that you do not owe this deficiency, and if you owe less than you showed on your return, you will have to apply for a refund, because that money is in the hands of the Government. Of course, you might have this argument with Mr. Maddox, that the theory of paying interest on the money refunded, is that the Government had unrestricted and free use of the money in the meantime, and the taxpayer did not, but on the contrary had been out of pocket this much and had not had the free use of it pending determination and audit, and therefore, ought to be compensated to that extent.

You might argue in this case that the Commissioner did not have the free use of it, because under the statute he never could
55 assess it. He might determine it due in the audit, and he could get the money, but that would be a restriction on the money in his hands, because he had not assessed it.

Mr. MADDOX. There is another point about it. I don't think the Commissioner should be put in the position of accepting a forced loan from the taxpayer, and pay on that loan 6% interest.

The MEMBER. It seems to me, unless it is different, and the taxpayer says, "This is additional revenue that I failed to return, and I am convinced I am going to have to pay some more tax. I think it is at least $600,000 and I will pay you that

"much," and then the Commissioner comes along and says, "That is right, you owe some more taxes, but it is more than $600,000; you owe me a million or two million," and the taxpayer advanced the money in anticipation of a claim.

Mr. MADDOX. Except this, and it is apparently the fact in this case, at the time he was paying the $600,000 and wanted to have it held in the event it would have to be paid.

The MEMBER. Well, this argument, stated simply, is that the amount should not be regarded as payment, unless the Commissioner accepts the amount as payment for something on his books which has been assessed. Isn't that a simple statement of the issue?

Mr. MADDOX. That is substantially it. Now, it seems
56 to me that the Commissioner could refund interest on what has been paid as tax. Now, suppose that taxpayer that this was a valid tax, and the tax was in process of determination, and some figure had been reached, and he believed it would be treated as tax—and this record discloses there has been determination by the Commissioner that there was a deficiency—now, of course, when we examine the return, suppose the taxpayer gets scared and starts making a little audit of his own, and then comes in and pays the tax, and afterward makes claim for refund? It seems to me that there is something inconsistent there.

The MEMBER. That does not put you on very much ground, Mr. Maddox. Frequently a taxpayer will report on his return certain items and at the same time put a rider on there stating that he does not think those items are proper, or in error, or something like that, and pays the tax shown on the return, and thereafter files claim for refund? So there is some inconsistency there, that is not present here. The taxpayer here, in fact, says, "I will give you $600,000, in the event there is any deficiency." "You have not found one so far, but I will give you the money in the event you do."

Mr. MADDOX. Well, the statute refers to payment on account of taxes, so therefore, it is necessary that all of the facts be before this Board to determine the amount of tax liability. Now——

57 The MEMBER. Now, let me interrupt you before I forget it. You know the Board has a case, at least one, that I can remember, involving the question where a corporation, the taxpayer, paid some real estate taxes before they were assessed, and it runs in my mind that in the same case there were a couple of other things involved. The question there was whether the taxpayer was entitled to reduction for the amount paid on account of real estate taxes; and there was

some mention made that another corporation turned over some money to this corporation for the purpose of paying taxes, which were not assessed. There was some argument by the Collection as to whether they turned over this money in anticipation of taxes going to be paid, and I am wondering if there may be something which is analgyous here.

Mr. DRYE. Taking that particular case, I don't think it different from the law laid down by the Board in similar cases.

In the Lehigh Valley Coal Sales case the Board held that a voluntary payment of taxes made without assessment should have been given effect in determining tax liability for the year in respect to which such payment was made. That is the Lehigh Valley Coal Sales Company, 15 BTA 1401.

It is disposed of rather summarily there. It is not discussed at great length.

58 A similar case is William Silver & Co., 10 BTA, and there the Board held that the amount of tax paid by the taxpayer, but not assessed by the Collector, should be considered in computing in statutory deficiency.

Now, when we come to the question of whether we are imposing anything on the Commissioner, we must view the letter written to the Collector in which it was stated:

"We are sending you herewith check to your order in the amount of $600,000 as a payment on account of any deficiency Federal Estate Tax which may be determined to be due from said decedent's estate."

There the purpose of the payment was disclosed, and we asked that the routine receipt be sent us. That was the statement. There is no question about the facts.

The Commissioner was not forced to accept the payment. He could have returned it; the Commissioner could have returned it promptly. But, as a matter of fact, the Commissioner from that day until this has never raised any question about it in any way.

The MEMBER. The question of these voluntary payments come up every once in a while. I don't know much about the Collector's system, but in the case I cited I don't think the Collector assessed the amount, but just kept it in unidentified accounts in his office, so that he was not committed one way or another, and he did not give it to the Government and the taxpayer was still able to get it back.

59 The thing disturbing me is Mr. Drye's point that when you make a return the Commissioner immediately assesses the amount shown in the return.

Mr. MADDOX. Yes; that is his assessment. That is his authority.

The MEMBER. Do you want to file a memorandum, Mr. Maddox, or just a statement?

Mr. MADDOX. I am satisfied just to submit our oral statement. I want to make this observation: the case cited in Mr. Drye's brief, Atlantic Oil Producing Co., the official citation is 35 Federal Supplement 766; that case is distinguished from this case. In that case it was never said that the tax was due, but the taxpayer made tentative payment, and that the government was powerless at the time the money was paid to determine how much tax was due. I don't think it is necessary to go into the facts at great length at this time.

I would also refer your Honor to the decision of the United States District Court for the Southern District of New York, in Henry L. Moses as Executor of the Estate of Theodore Goldsmith, deceased, vs. the United States.

Mr. DRYE. I have referred to that in my memorandum.

Mr. MADDOX. That case holds contrary to the decision I have referred to by the Court of Claims in the Atlantic Oil Producing case.

60 The MEMBER. All right. The case stands submitted. I will take it under advisement.

(Thereupon, the hearing in the above-entitled matter was adjourned.)

61 United States Board of Tax Appeals, Washington

Docket No. 100026

ESTATE OF HENRY H. ROGERS, DECEASED, ADRIAN H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTORS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

In accordance with the petitioner's recomputation of tax filed with the Board on February 27, 1942 pursuant to the Board's memorandum opinion entered on December 20, 1941, and the accompanying memorandum, it is

Ordered and decided: That there is an overpayment of estate tax in the amount of $1,300,411.02, all of which was paid within three years before the filing of claim for refund.

(Signed) J. E. MURDOCK, *Member.*

Enter: Entered May 12, 1942

Memorandum to accompany decision

MURDOCK. The parties have submitted recomputations under Rule 50 in which they agree that the tax liability of the estate computed in accordance with the opinion of the Board is $7,491,556.07. They had previously stipulated that "the petitioners have made the following payments on account of the Federal Estate Tax with respect to decedent's estate: May 18, 1936, $1,000,000; July 24, 1936, $7,191,967.09; and September 14, 1937, $600,000 (this last payment has not been assessed and is held in the Collector's office in the account known as 'unidentified accounts')."

The parties are in disagreement as to whether or not the $600,000 should be considered in determining the overpayment within the meaning of Section 912 of the Internal Revenue Code. That section gives the Board jurisdiction to determine the amount of overpayment if it "finds that the executor has made an overpayment of tax." The Commissioner apparently proposes merely to return the $600,000 as if it had been a deposit. He contends that it is not a part of the overpayment. Interest must be paid on overpayments which are refundable, but the Board has no jurisdiction over or concern with the question of interest.

62 The estate paid all of the tax shown to be due on the return, and made the additional payment of $600,000 in anticipation of the determination of a deficiency. The Commissioner shortly thereafter determined a deficiency in excess of $600,000.

The Commissioner has not filed a brief and has not cited any authorities in support of his computation except the case of Moses v. United States, 28 Fed. Supp. 17. The executor in that case, before filing the estate tax return, sent a check for $20,000 to the collector. The correct tax liability, as subsequently determined, was about $12,000. The court held that the excess over that amount was not a payment of tax and there was no overpayment. It reasoned that there could be no payment unless the money passed from a debtor to a creditor for the purpose of extinguishing a debt, and there was no debt at the time the payment was made. Three other cases are to the contrary and support the petitioner's contention: Atlantic Oil Producing Co. v. United States, 35 Fed. Supp. 766; Chicago Title & Trust Co., Executor, v. United States,—Fed. Supp.—(Jan. 7, 1942); Busser v. United States,—Fed. Supp.—(Jan. 23, 1942). If money merely passes in discharge of an existing debt, no overpayment will result. There can be no overpayment unless more is paid than is actually owed under the

statute. The parties have stipulated that the $600,000 was paid on account of the Federal estate tax with respect to the decedent's estate. The Commissioner later determined that a larger amount was due. He had not returned the $600,000 as he could have done, but he still had it in his hands, available to discharge the additional tax had it turned out that such additional tax was due under the statute. Compare the definition of a deficiency in Section 307 of the Revenue Act of 1926. The $600,000 must be considered as a payment in determining the overpayment of tax.

Entered May 12, 1942.

63 In the United States Circuit Court of Appeals for the Second Circuit

B. T. A. No. 100026

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER OF REVIEW

v.

ADRIAN H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY H. ROGERS, DECEASED, RESPONDENT ON REVIEW.

Petition for review and assignments of error

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Comes now Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Ralph F. Staubly, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue, appointed and holding office by virtue of the laws of the United States; that Adrian H. Larkin, residing at Southampton, New York, Albert Stickney, residing at 8 East 93rd Street, New York, New York and Central Hanover Bank and Trust Company, with its principal place of business located at 70 Broadway, New York, New York, are the duly appointed, qualified and acting executors of the

64 Estate of Henry H. Rogers, deceased; that the Estate

Tax Return, Form 708, filed on behalf of the decedent's estate, was filed with the Collector of Internal Revenue for the First District of New York, whose office is located in Brooklyn, New York, which is within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit.

The Court in which the review in this proceeding is sought is the United States Circuit Court of Appeals for the Second Circuit.

II

The nature of the controversy is as follows, to wit:

The Estate Tax Return filed on behalf of the decedent's estate disclosed a tax liability of $8,191,967.09. The decedent, at the date of his death, possessed a general power of appointment over certain property conferred upon him under the will of his father, Henry H. Rogers, Sr. The will of the decedent's father provided that in the event the power of appointment should not be exercised, the property in question should pass to the heirs at law of the decedent, in accordance with the laws of the State of New York. The heirs at law of the decedent were his widow, daughter and his son. The decedent by his will exercised such power of appointment by appointing 6.667% of the property outright to his widow, daughter and a grandson in equal shares and appointed a one-third share of the residue to his widow and a like one-third share to his daughter for life with remainders over and the other one-third share
65 outright to his grandson.

Under date of June 29, 1939, the Commissioner of Internal Revenue mailed a notice to the executors aforesaid, respondents on review, asserting a deficiency in the estate tax in the amount of $849,524.19. In determining the deficiency the Commissioner included in the decedent's gross estate the full value of the property over which the decedent possessed a general power of appointment.

Under date of September 15, 1939, the executors aforesaid filed a petition with the Board of Tax Appeals for a redetermination of the deficiency in the estate tax as above mentioned. After the answer of the Commissioner was duly filed, the case was submitted to the Board for decision. The Memorandum Opinion of the Board was entered December 20, 1941, and the final order of the Board, redetermining the deficiency, was entered May 12, 1942, in which it was ordered and decided that there is an overpayment of estate tax in the amount of $1,300,411.02.

The Board of Tax Appeals in redetermining the tax liability, as above stated, erroneously held and decided that the property

over which the decedent exercised a general power of appointment was subject to be included in the decedent's gross estate only to the extent of the interest passing to the grandson and the remainder interests above referred to, inasmuch as the interests passing to the widow and daughter were less than that which they would otherwise have taken had the power not been exercised, and that the Board in determining the over-
66 payment in the estate tax, erroneously treated a deposit of $600,000 made with the Collector of Internal Revenue to be applied against the deficiency, if any, as should be ultimately determined, constituted a payment of tax.

III

The Commissioner of Internal Revenue, being aggrieved by the conclusions of law contained in the decision of the Board of Tax Appeals and by its order of redetermination of the deficiency in estate tax, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Second Circuit.

The Commissioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in holding and deciding that the property over which the decedent possessed a power of appointment under his father's will, was subject to be included in the decedent's gross estate only to the extent of the remainder interests in one-third thereof less 6.667% placed in trust for the life use of his widow, a remainder interest in one-third thereof less 6.667% placed in trust for life use of his daughter and one-third thereof passing to his grandson Peter, as property passing under a general power of appointment exercised by the decedent.

2. The Board of Tax Appeals erred in not holding and deciding that all of the property over which the decedent possessed a power of appointment under his father's will was subject to be included in the decedent's gross estate as property passing under a general power of appointment exercised
67 by the decedent.

3. The Board of Tax Appeals erred in holding and deciding that no part of the property over which the decedent possessed a general power of appointment, is subject to be included in the decedent's gross estate pursuant to the provisions of Section 302(a) of the Revenue Act of 1926.

4. The Board of Tax Appeals erred in failing and refusing to hold that all of the property over which the decedent held a power of appointment under his father's will was subject to be included in the decedent's gross estate pursuant to the

provisions of Section 302(a) of the Revenue Act of 1926, as representing the extent of the decedent's interest therein as of the date of his death.

5. The Board of Tax Appeals erred in entering its order of redetermination that there is an overpayment of estate tax in the amount of $1,300,411.02, in that the Board erroneously held that the deposit of $600,000 made with the Collector of Internal Revenue to be applied against the deficiency, if any, as should be ultimately determined, constituted a payment of tax.

6. The Board of Tax Appeals erred in entering its final order of redetermination that there is an overpayment in the estate tax in the amount of $1,300,411.02.

7. The Board of Tax Appeals erred in failing and refusing to enter its final order of redetermination that there is a
68 deficiency in the estate tax, as determined by the Commissioner, subject to adjustments stipulated.

WHEREFORE, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd.) SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
(Sgd.) J. P. Wenchel,
R. L. W.
(Sgd.) J. P. WENCHEL,
J. P. Wenchel,
Chief Counsel
Bureau of Internal Revenue.

Of Counsel:
RALPH F. STAUBLY,
Special Attorney,
Bureau of Internal Revenue.
RFS–spt 8–3–42.

69 UNITED STATES OF AMERICA,
District of Columbia, ss:

RALPH F. STAUBLY, being duly sworn, says that he is a Special Attorney in the Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents

thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to these matters he believes it to be true.

(Sgd.) RALPH F. STAUBLY,
Special Attorney,
Bureau of Internal Revenue.

Sworn and subscribed to before me this 4th day of August, 1942.

(Sgd.) GEORGE W. KREIS,
Notary Public.

My commission expires November 15, 1942.

70 In the United States Circuit Court of Appeals for the Second Circuit.

B. T. A. No. 100026

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW

v.

ADRIAN H. LARKIN, ALBERT STICKNEY, AND CENTRAL HANOVER BANK AND TRUST COMPANY, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY H. ROGERS, DECEASED, RESPONDENTS ON REVIEW

Received August 12, 1942. U. S. Board of Tax Appeals.

Notice of filing petition for review

To CENTRAL HANOVER BANK AND TRUST COMPANY, *as Executor of the Last Will and Testament of Henry H. Rogers, deceased, 70 Broadway, New York, New York.*

You are hereby notified that the Commissioner of Internal Revenue did, on the 4th day of August, 1942, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for a review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 4th day of August, 1942.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel, *Chief Counsel,*
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 5th day of August, 1942.

apt 8-3-42

CENTRAL HANOVER BANK & TRUST CO.
(S) A. F. SMITH, *Respondent on Review,*
Asst. Vice Pres.

71 In the United States Circuit Court of Appeals
for the Second Circuit

B. T. A. No. 100026

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW

v.

ADRIAN H. LARKIN, ALBERT STICKNEY, AND CENTRAL HANOVER BANK AND TRUST COMPANY, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY H. ROGERS, DECEASED, RESPONDENTS ON REVIEW

Received Aug. 12, 1942. U. S. Board of Tax Appeals.

Notice of filing petition for review

To:

JOHN W. DRYE, JR., Esq.,
HAROLD A. DONEGAN, Esq.,
ARTHUR W. SIEGRIST, Esq., *70 Broadway, New York City.*

You are hereby notified that the Commissioner of Internal Revenue did, on the 4th day of August, 1942, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for a review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 4th day of August 1942.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel.
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors

mentioned therein, is hereby acknowledged this 10 day of August 1942.

(s) JOHN W. DRYE,
(s) HAROLD A. DONEGAN,
(s) ARTHUR W. SIEGRIST,
Attorneys for Respondents on Review.

August 5th, 1942.

72 In the United States Circuit Court of Appeals
for the Second Circuit

B. T. A. No. 100026

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW

v.

ADRIAN H. LARKIN, ALBERT STICKNEY, AND CENTRAL HANOVER BANK AND TRUST COMPANY, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY H. ROGERS, DECEASED, RESPONDENTS ON REVIEW

Received Aug. 14, 1942. U. S. Board of Tax Appeals.

Notice of filing petition for review

To: ALBERT STICKNEY, *As Exec. of the Last Will and Testament of Henry H. Rogers, deceased, 3 East 93rd Street, New York, New York.*

You are hereby notified that the Commissioner of Internal Revenue did, on the 4th day of August, 1942, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for a review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 4th day of August 1942.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 10 day of August 1942.

(s) ALBERT STICKNEY,
Respondent on Review.

73 United States Board of Tax Appeals

Docket No. 100026

ESTATE OF HENRY H. ROGERS, DECEASED, ADRIAN H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Stipulation of Facts

It is hereby stipulated and agreed, by and between the parties hereto by their respective attorneys, that the following facts may be taken as true and that the same may be considered as offered in evidence by the parties to this proceeding; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true:

1. Henry H. Rogers, (hereinafter referred to as "decedent"), died on July 25, 1935, a resident of Southampton, Suffolk County, New York. Petitioners are the duly qualified and acting executors of decedent's last will and testament, letters testamentary having been duly granted to them by the Surrogate's Court of Suffolk County on October 28, 1935. Said letters are still in full force and effect. Petitioner Adrian H. Larkin resides at Southampton, New York, and petitioner Albert Stickney resides at 130 East 67th Street, New York City.

74 Petitioner Central Hanover Bank & Trust Company is a corporation duly organized and existing under the laws of the State of New York having its principal office and place of business at 70 Broadway, New York City.

2. The Federal estate tax return for the estate of said decedent was filed with the Collector of Internal Revenue for the First District of New York on July 24, 1936. Petitioners have made the following payments on account of the Federal estate tax with respect to decedent's estate; May 18, 1936, $1,000,000; July 24, 1936, $7,191,967.09; and September 14, 1937, $600,000 (this last payment has not been assessed, and is held in the Collector's office in the account known as "unidentified accounts").

3. On July 24, 1939, petitioners filed with the Collector of Internal Revenue for the First District of New York a claim for refund in the amount of $1,505,398.64, a true copy of which is annexed hereto, marked Exhibit "A" and made a part hereof.

4. Decedent's father, Henry H. Rogers (hereinafter referred to as Rogers, Sr.), died on May 19, 1909, leaving a last will

and testament which was duly admitted to probate in the Surrogate's Court of New York County, State of New York, on May 28, 1909. A copy of said last will and testament is annexed hereto, marked Exhibit "B" and made a part hereof. Article Eighth of said last will and testament provided in part as follows:

EIGHTH

All the rest, residue and remainder of my property both real and personal, of every kind and description whatsoever and wheresoever situated, I give, devise, and bequeath to my trustees, hereinafter named, in trust, however, for the uses and purposes following:

75 I. To divide the said property into as many equal shares, as I shall leave children me surviving, and lineal descendants of deceased children one share for each child and one share for the lineal descendants of each deceased child; the names of all my children now living being Anne Engle Benjamin, Cara Leland Broughton, Mai Rogers Coe, and Henry Huddleston Rogers, Jr.

* * * * *

IV. To apply the income of each share, set apart for the benefit of any child of mine, who shall not have attained the age of forty years, at the time of my death, to the use of such child, until he shall attain the age of forty years, and thereupon to convey, transfer and pay over to the said child one-half of the principal of the share set apart for the said child as aforesaid, and to apply the income of the remaining half of each such share to the use of the said child during his or her life; and, upon the death of the said child, to convey, transfer and pay over the principal thereof to such persons or corporations and in such manner as the said child shall direct by his Last Will and Testament, or, in the absence af such direction, to such persons as shall then constitute the heirs at law of the said child, as in the case of the inheritance of real property, according to the laws of the State of New York.

5. Decedent attained the age af forty years on December 28, 1919, and thereafter the share of the trust created for decedent under said Will of his father to which he then became entitled was paid over to him.

6. By Articles Twelfth and Sixteenth of decedent's last will and testament, a true copy of which is annexed hereto, marked Exhibit "C" and made a part hereof, decedent exercised the power of appointment over the balance of said trust given to him by the said Will (Exhibit "B") of his father, Rogers, Sr.

7. At the time of decedent's death, he left surviving him a widow, two children by his first wife—Henry H. Rogers, Third, and Millicent Rogers Balcom—and three grandchildren, Peter Salm, Arturo Henry Peralta Ramos and Paul Jamie Peralta Ramos, the children of Millicent Rogers Balcom. The widow was 45 years of age when decedent died and she remarried on April 30, 1937 and after that date was and is now known as Pauline V. Hoving; Millicent Rogers Balcom, the daughter, was 33 years of age, and decedent's son, Henry H. Rogers, Third, was 30 years of age. Peter Salm, who was the son of Millicent Rogers Balcom, was eleven years of age, and the two Ramos children, sons of Millicent Rogers Balcom, were seven and four years of age, respectively.

8. Without admitting the relevancy thereof, the petitioners admit that during the pendency of the administration of decedent's estate, decedent's widow filed on April 23, 1936 an application with the Surrogate's Court of Suffolk County for a determination of her right under Section 18 of the Decedent Estate Law to elect to take against the provisions of the last will and testament of decedent, and the effect of such an election, although a waiver of her right of election, duly executed by the widow on January 13, 1934 as prescribed by said Section 18, was attached to and filed in said Surrogate's Court with the decedent's will dated January 13, 1934 (Exhibit "C"). The Surrogate's Court of Suffolk County dismissed the application of the widow on July 13, 1936. An appeal was taken by the widow from the decision of the Surrogate and on February 19, 1937 the New York Supreme Court, Appellate Division, Second Department, affirmed the decision of the Surrogate, such decision being reported in 250 App. Div. (New York) 26, 293 N. Y. Supp. 626.

77 9. Without admitting the relevancy thereof, the petitioners admit that in a proceeding in the Surrogate's Court of New York County involving the judicial settlement of the account of the trustees of said trust created under Rogers, Sr.'s will for the benefit of decedent, Henry H. Rogers Third, son of decedent, filed an answer in which he attacked the legality of his father's exercise of the power of appointment. The Surrogate's Court of New York County held against the contentions of the decedent's son, the decision being rendered on May 23, 1938, and reported in 168 Misc. (N.Y.) 63, 6 N. Y. Supp. (Second Series) 254.

10. By a decree of the Surrogate's Court of New York County, entered January 12, 1939, in the proceeding involving the judicial settlement of the account of the trustees of said trust created under Rogers, Sr.'s will for the benefit of decedent, a

true copy of said decree being attached hereto marked Exhibit "D" and made a part hereof, it was determined, among other things, that as to 6.667% of the corpus of said trust the appointment in further trust under Article Twelfth of decedent's will (Exhibit "C") was invalid but that said 6.667% of said trust corpus had been validly appointed by Article Sixteenth of said will outright in equal shares to decedent's widow, Pauline V. Hoving, his daughter, Millicent Rogers Balcom, and his grandson, Peter Salm. It was also determined by said Surrogate's decree that the appointment in further trust for the benefit of decedent's widow, Pauline V. Hoving, and daughter, Millicent Rogers Balcom, of two-thirds of the balance of the corpus of said trust fund remaining after the payment of said
78 6.667% thereof, was valid. It was further held that the appointment in trust for the life of Peter Salm was invalid under Article Twelfth since Peter Salm was not in being at the time of the death of Rogers, Sr. but that under Article Sixteenth the appointment to Peter Salm was valid.

11. The "heirs at law" of decedent, "as in the case of the inheritance of real property, according to the laws of the State of New York" within the provisions of said Will of decedent's father were his widow, Pauline V. Hoving, his daughter, Millicent Rogers Balcom, and his son, Henry H. Rogers, Jr., who would have taken decedent's real property in equal shares if he had not left a will.

12. The net value at the date of decedent's death of the property in the trust created under Rogers, Sr.'s will for the benefit of decedent amounted to $8,428,949.60. The value of decedent's net taxable estate, exclusive of the value of the property in said trust, amounts to $14,592,436.20 under the provisions of the Revenue Act of 1926 and $14,642,436.20 under the provisions of the Revenue Act of 1932, as amended by the Revenue Act of 1934. It is further agreed that if all of the property in said trust is held to be includible in decedent's net taxable estate, the net taxable estate of decedent under the Revenue Act of 1926 and the Revenue Act of 1932, as amended by the Revenue Act of 1934, amounts to $23,021,385.80 and $23,071,385.80, respectively. (The aforesaid amounts
79 give effect to an agreed settlement by the parties of all raised in the petition, with the exception of the issue relating to the value of property passing under power, and also certain affirmative issues which respondent has contemplated raising in these proceedings).

13. It is also agreed by petitioners and the respondent that the Board enter its decision under Rule 50 in accordance with the facts herein stipulated, determining an overpayment or

the correct deficiency to be assessed regardless of whether the amount of the deficiency, if any, is larger than the amount of the deficiency proposed by respondent in his deficiency notice of June 29, 1939. (Respondent in presenting this stipulation at the hearing before the Board makes claim for any increased deficiency.)

14. While respondent contends that the net value at the date of decedent's death of the entire property held in the trust created under Rogers, Sr.'s will for the benefit of decedent is to be included in decedent's net taxable estate without any diminution thereof, it is agreed that the amount of the property comprising said trust which was distributed outright to decedent's widow, Pauline V. Hoving, and decedent's daughter, Millicent Rogers Balcom, under the provisions contained in Article Sixteenth of decedent's will, is $187,319.36 to each.

15. The present worth of a life interest in $1.00 of a person 45 years of age is $0.57143. The present worth of a life interest in $1.00 of a person 33 years of age is $0.67383. Respondent, in his notice of deficiency dated June 29, 1939, included in decedent's net taxable estate the entire net value of the
80 property held in the trust created under Rogers, Sr.'s will for the benefit of decedent as computed by him to be $8,465,040.74. Respondent now contends that the aforesaid property should be valued at $8,428,949.60 and that such amount is includible in the net taxable estate of the decedent as the value of the property passing under the exercise of the power. Petitioners contend that the net taxable estate should not include the value of the property comprising said trust which passed outright to said Pauline V. Hoving and Millicent Rogers Balcom and the value of their respective life interests in such property.

16. Petitioners are entitled to credit for state, estate, inheritance, legacy or succession taxes paid, in addition to the amount allowed in the respondent's notice of deficiency dated June 29, 1939, of any and all amounts paid for New York and Massachusetts inheritance and estate taxes in accordance with section 301 (b) of the Revenue Act of 1926, as amended.

(Sgd) JOHN W. DRYE, Jr.,
(Sgd) HAROLD A. DONEGAN,
(Sgd) ARTHUR W. SIEGRIST,
Attorneys for Petitioners.
E.C.A. J. P. WENCHEL,
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

81

Exhibit A

Form 843, Treasury Department, Internal Revenue Service, Revised June, 1930.

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☒ Refund of Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

COLLECTOR'S STAMP
(Date received)

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

TYPE OR PRINT

Name of taxpayer or purchaser of stamps, Adrian H. Larkin, Albert Stickley and Central Hanover Bank and Trust Company, as Executors of the Last Will and Testament of Henry H. Rogers, deceased.
Business address, 70 Broadway, New York, New York.
Residence _____

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed, 1st District, New York.
2. Period (if for income tax, make separate form for each taxable year) from _____, 19____, to _____, 19____.
3. Character of assessment or tax, Estate.
4. Amount of assessment, $7,791,967.09; dates of payment, July 24, 1936, and September 14, 1937.
5. Date stamps were purchased from the Government _____
6. Amount to be refunded _____ $1,505,338.64
7. Amount to be abated (not applicable to income or estate taxes) _____ $_____
8. The time within which this claim may be legally filed expires, under Section 319 of the Revenue Act of 1926, on July 24, 1939, and September 14, 1940.

The deponent verily believes that this claim should be allowed for the following reasons:

See annexed statement.

Attach letter size sheets if space is not sufficient.

CENTRAL HANOVER BANK AND TRUST COMPANY,
Signed by C. L. HERTERICH,
Asst. Vice-President.
ADRIAN H LARKIN,
ALBERT STICKLEY.

Sworn to and subscribed before me this 24 day of July 1939.

ARTHUR J. QUINN,
Notary Public, New York County.

N. Y. Co. Clk's No. 15, Reg. No. 1Q17. Kings Co. Clk's No. 5, Reg. No. 1012. Commission expires March 30, 1941.

(SEE INSTRUCTIONS ON REVERSE SIDE)

82

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Character of assessment and period covered	List	Year	Month	Account No. of— Page	Account No. of— Line	Amount assessed	Paid, abated, or credited — Date	Paid, abated, or credited — Amount	Pd Ab Cr
						$		$	
					Total.	$		Total.	$

Claim No.

Claim No.

I certify that the records of this office show the following facts as to the purchase of stamps:

To whom sold or issued	Kind	Number	Denomination	Date of sale or issue	Amount	If special tax stamp state— Serial number	If special tax stamp state— Period commencing
					$		

Claim examined by

Chief of Division

Collector of Internal Revenue. (District)

COMMITTEE ON CLAIMS

Amount claimed $

Amount allowed $

Amount rejected $

INSTRUCTIONS

1. The claim must set forth in detail and under oath, each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf

of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collecter, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

83 STATEMENT

ESTATE OF HENRY H. ROGERS.

1. Adjustments with respect to Items 34 and 55, Schedule C of return determined in letters from Treasury Department, dated May 4, 1938 and June 29, 1939 and bearing symbols MT-ET-8941-1st New York.

2. Adjustments with respect to Items 1, 2 and 4, Schedule D-2 of return determined in said letters.

3. Adjustments with respect to increased and additional funeral expenses, executors' commissions, miscellaneous administration expenses and debts determined in said letters.

4. The fair market value of Item 1, Schedule F of return to be included in the gross estate should be $4,841,128.45.

5. The deduction for executors' commissions should include the amount of additional commissions to be awarded to the executors upon the settlement of their final account.

6. The deduction for attorneys' fees should include any additional amount actually paid for same through the closing of the estate.

7. Decedent's indebtedness to Bankers Trust Company, amounting to $21,875 and referred to in said letter dated June 29, 1939, should be allowed as a deduction.

8. Credit for State estate and inheritance taxes should be allowed to the full extent of 80% of the tax under the 1926 Revenue Act.

84 *Exhibit B*

LAST WILL AND TESTAMENT OF HENRY H. ROGERS

DATED MAY 7, 1907

85 I, Henry H. Rogers, of the City of New York, do hereby make, publish and declare this my last will and testament, hereby revoking all former Wills by me made.

FIRST

I give, devise and bequeath to my wife, Emilie R. Rogers, during her life, the use of my house, known as Number 3 East 78th Street, in the City of New York, and of all my linen, bric-a-brac, works of art, household goods and furniture (useful and ornamental), china, plate, silverware, books and pictures (except as hereinafter provided in the Fourth Article of this Will; and I also give and devise to my said wife, during her life, the use of my stable and garage, known as Number 62 East 58th Street, in the said City, and of all my automobiles, horses and carriages and the harness and the appurtenances thereto belonging; all taxes and water rates and the cost of all necessary repairs on the said real estate, to be paid by my said wife while she has the use of the same.

SECOND

I give and bequeath to my Trustees, hereinafter named, such sum, not less than Two million, five hundred thousand Dollars ($2,500,000), nor more than Three million Dollars ($3,000,000), as, in the opinion of my said Trustees, shall be amply sufficient to produce an annual income of One hundred thousand Dollars ($100,000), in trust, however, for the uses and purposes following:

I. To apply, during the life of my said wife, the income thereof, to the extent of One hundred thousand Dollars ($100,000) per year, in equal quarterly payments to her use, and, during the same period, to apply the income, if any, in excess of that sum to the use of my lineal descendants, in equal shares, per stirpes and not per capita.

II. Upon the death of my said wife, to dispose of the principal of the said Trust Fund as part of my Residuary Estate, in the manner directed by the Eighth Article of this Will.

86 I declare that the provisions of this Will for the benefit of my said wife are to be in lieu and bar of her dower and of all other right, share or interest of, in or to my estate.

THIRD

I give and devise to my son, Henry H. Rogers, Jr., my summer home at Fairhaven, Bristol County, Massachusetts, together with all the buildings thereon and the contents thereof and the appurtenances thereto, and all my land in the Town of Fairhaven aforesaid; to have and to hold the same to him his heirs and assigns, forever.

FOURTH

I give and bequeath to my said son all my jewelry, wearing apparel, personal ornaments and effects.

I also give and bequeath to my said son the possession and use during his life of the pastile portrait of my grandfather; and, on the death of my son, I give and bequeath the said portrait to my grandson, Henry H. Rogers, 3d; or if he does not survive my son, then I give the said portrait to the eldest male issue of my son, living at his death. If he should leave no male issue; then I give and bequeath the said portrait, on the death of my son, to my eldest daughter then living.

FIFTH

I give and bequeath to my trustees, hereinafter named, the following sums, in trust, for the uses and purposes following.

I. Two hundred thousand Dollar ($200,000) to apply the income thereof to the use of my brother, Rufus A. Rogers, during his life.

II. One hundred thousand Dollars ($100,000), to apply the income thereof to the use of Maud Rogers, wife of my said brother, Rufus A. Rogers, during her life.

III. Fifty Thousand Dollars ($50,000), to apply the income thereof to the use of Marion Rogers, daughter of my said brother, Rufus A. Rogers, during her life.

IV. Fifty thousand Dollars ($50,000), to apply the income thereof to the use of Rowland Rogers, son of my said brother, Rufus A. Rogers, during his life.

V. Twenty thousand Dollars ($20,000), to apply the income thereof to the use of my cousin, Sarah T. Huttleston, daughter of the late Henry Huttleston, during her life.

87 VI. Twenty thousand Dollars ($20,000), to apply the income thereof to the use of my cousin, Julia Tuck, widow of Samuel P. Tuck, of Brooklyn, New York, during her life.

VII. Twenty thousand Dollars ($20,000), to apply the income thereof to the use of my cousin, Agnes I. Gardner, the widow of Theodore Gardner, during her life.

VIII. Twenty thousand Dollars ($20,000), to apply the income thereof to the use of my cousin, Jane W. Nye, of New Bedford, Massachusetts, widow of Clement Nye, during her life.

IX. Ten thousand Dollars ($10,000), to apply the income thereof to the use of Jennie Nye, daughter of my cousin, Jane W. Nye, during her life.

X. Ten thousand Dollars ($10,000), to apply the income thereof to the use of Mary Nye, daughter of my cousin, Jane W. Nye, during her life.

Upon the death of each of the beneficiaries named in this Fifth Article, to dispose of the principal sum held for such beneficiary as part of my Residuary Estate, in the manner directed by the Eighth Article of this Will.

SIXTH

I give and bequeath to the Town of Fairhaven, in the State of Massachusetts, the sum of One hundred thousand Dollars ($100,000), in trust however, as a permanent endowment fund; and I direct that the income thereof be applied toward the maintenance of the Primary and Grammar Schools of the said Town of Fairhaven.

SEVENTH

I exonerate and discharge all legatees under this Will from the payment of any indebtedness there may be owing to me by them at the time of my death.

EIGHTH

All the rest, residue and remainder of my property, both real and personal, of every kind and description whatsoever and wheresoever situated, I give, devise, and bequeath to my Trustees, hereinafter named, in trust, however, for the uses and purposes following:

I. To divide the said property into as many equal shares, as I shall leave children me surviving, and lineal descend-
88 ants of deceased children, one share for each child and one share for the lineal descendants of each deceased child; the names of all my children now living being Anne Engle Benjamin, Cara Leland Broughton, Mai Rogers Coe and Henry Huttleston Rogers, Jr.

II. To convey, transfer, and pay over to the lineal descendants of any child of mine, who shall not be living at the time of my death, the share set apart for such lineal descendants, in equal shares, per stirpes and not per capita.

III. To convey, transfer, and pay over to each child of mine, who at the time of my death shall have attained the age of forty years, one-half of the principal of the share set apart for such child, as aforesaid, and to apply the income of the remaining half of each such share to the use of the said child, during his or her life; and, upon the death of the said child,

to convey, transfer, and pay over the principal thereof to such persons or corporations and in such manner, as the said child shall direct by his Last Will and Testament, or, in the absence of such direction, to such persons as shall then constitute the heirs at law of the said child, as in the case of the inheritance of real property, according to the laws of the State of New York.

IV. To apply the income of each share, set apart for the benefit of any child of mine, who shall not have attained the age of forty years, at the time of my death, to the use of such child, until he shall attain the age of forty years, and thereupon to convey, transfer, and pay over to the said child one-half of the principal of the share set apart for the said child as aforesaid, and to apply the income of the remaining half of each such share to the use of the said child during his or her life; and, upon the death of the said child, to convey, transfer, and pay over the principal thereof to such persons or corporations and in such manner as the said child shall direct by his Last Will and Testament, or, in the absence of such direction, to such persons as shall then constitute the heirs at law of the said child, as in the case of the inheritance of real property, according to the laws of the State of New York.

NINTH

I direct that in case any litigation whatever arises in respect to this Will or any of its provisions or its probate or concerning the Trusts hereby created, or any of them, all the costs, disbursements, and allowances awarded by the Court to all the parties concerned in such litigation, and also all the costs, disbursements, counsel fees, and expenses of every name, nature, and description, which may be incurred by the Executors of or the Trustees under this Will in defending or preparing to defend any such legal proceedings, or in taking advice with respect to their rights and duties concerning the same, or with respect to the construction of this Will or any question growing out thereof, shall be charged against the amount coming under this Will or otherwise from my Estate to the persons commencing or joining in such legal proceedings against the said Executors and Trustees and shall be considered as so much money paid to such persons or applied to their use, with like effect, in every respect, as if the same amount of money or its equivalent had been paid, transferred, or conveyed directly to them by my said Executors and Trustees. The statement of the amounts incurred by my said Executors or Trustees, as aforesaid, shall be accepted as conclusive upon

any accounting by them with respect thereto, both as to the reasonableness of any counsel fees paid and as to the correctness of all payments made.

TENTH

I direct my Trustees to apply the income of all securities at any time held by them, to the use of the beneficiary for whom they are held, irrespective of the price paid for them or of their market value at any time; it being my intention that no part of such income shall be applied as a sinking fund to offset the gradual loss of the premium upon or market value of any such securities.

ELEVENTH

I hereby give my Executors and Trustees, acting under this Will, full power and authority, in their discretion, to hold and retain any property coming to them under this Will, in the same form of investment as that in which it may exist at the time of my death, although it may not be of the character of investments now permitted by law to Trustees. I also give to my said Executors and Trustees full power and authority, in their discretion, to sell, lease or exchange the whole or any part of such property, whether real or personal, and to invest and reinvest the proceeds in such amounts as they may see fit, in real estate in the State of New York, or elsewhere, or in Bonds of any State or Government, within or without the United States, or in bonds, notes or other obligations, secured by mortgage on real estate within or without the State of New York, or in the Stocks or Bonds of such Railroad or other Companies
in any part of the United States or Canada, as, at the
90 time of such investment, are in good credit and standing; or with the written consent of the beneficiary, in corporate or other Stocks or Securities or other personal property of any kind or description, although the same may not be of the character permitted for Trustees' investments by the ordinary rules of law.

TWELFTH

I hereby authorize my Executors and Trustees to compromise and adjust any claim, of whatever kind, which may be made against or in favor of my estate, upon such terms and in such manner as may to them, in their absolute and uncontrolled discretion, seem advisable.

THIRTEENTH

I appoint my son, Henry H. Rogers, Jr., John W. Sterling, of New York City, Walter P. Winsor, of Fairhaven, Massachusetts, and The Farmers' Loan and Trust Company, of the City of New York, the Executors of and Trustees under this Will. It is my wish, however, that my said son shall not act as Trustee for the share set apart for his own benefit. I direct that no security be required of any of my Executors or Trustees in the performance of their duties as such.

FOURTEENTH

Upon the death, resignation or failure to act of any one of my individual Trustees, I authorize and empower the remaining two Trustees, by an instrument in writing, duly executed and acknowledged, to appoint an associate Trustee to act with them hereunder and to appoint a successor of either of them, and in case, at any time, the number of the individual Trustees hereunder should be reduced to one, I authorize and request him, within sixty days thereafter, by an instrument in writing, duly executed and acknowledged by him, to appoint an associate Trustee or a successor; and, in case he should fail to do so within the said period of sixty days, I authorize and request my children, then surviving, to do so. Any person so appointed under the terms of this Article shall, without giving any security, have the same rights, powers, discretion and obligations, as if he had been originally designated and appointed a Trustee by the terms of this Will.

91 In witness whereof, I have hereunto set my hand and seal this seventh day of May, 1907.

HENRY H. ROGERS. [SEAL]

The foregoing instrument was, on the day of the date thereof, signed, sealed, published and declared by Henry H. Rogers, the Testator therein named, as and for his last will and testament, in the presence of us, who, at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

The words "John W. Sterling of New York City" inserted by the Testator in the Thirteenth Article, before execution.

CORTLAND BETTS,
31 Hobart Avenue, Summit, New Jersey.
GEO. H. CHURCH,
1002 Madison Avenue, New York City.
KATHARINE I. HARRISON,
1354 Dean St., Brooklyn, N. Y.

92 *Exhibit C*

LAST WILL AND TESTAMENT OF HENRY H. ROGERS DATED JANUARY 13, 1934.

Date of death: July 25, 1935—Date of probate: October 28, 1935

93 Last Will and Testament of Henry H. Rogers

I, Henry H. Rogers, of Southampton, Long Island, New York, do hereby make, publish and declare the following as and for my Last Will and Testament, hereby intending to dispose of all property, real, personal and mixed, of whatsoever kind and wheresoever situated, of which I may die seized or possessed, and all property and estate to which I am or may be entitled and over which I have the power of appointment and disposition under the Last Will and Testament of my father, the late Henry Huttleston Rogers, or otherwise.

First. I hereby revoke any and all wills, codicils and testimentary documents by me heretofore made.

Second. I direct that all my just debts, funeral and testamentary expenses be paid by my Executors as soon after my death as may be practicable.

Third. I give and bequeath all of my ship models wherever located to the United States Naval Academy at Annapolis, Maryland, upon condition, however, that either the Naval Academy or the Navy Department make arrangements to the satisfaction of my Executors and/or Trustees, of which my Executors and/or Trustees shall be sole judges, for the
94 exhibition, maintenance and upkeep of this collection, including provision for a competent expert at an adequate salary who shall at all times be available to do the necessary repairs or upkeep.

If, however, such arrangements satisfactory to my Executors and/or Trustees are not made with the United States Naval Academy or the Navy Department, and so the collection of models will not pass under this Will to the United States Naval Academy, then I give and bequeath the same to my grandson, Peter Alfred Constantin Maria Salm (hereinafter referred to as Peter), if he shall survive me, to and for his own use forever, but if he shall not then be alive, I direct that the same shall fall in and become a part of my residuary estate and be distributed accordingly.

Fourth. I give and bequeath to my wife, Pauline Rogers, a legacy of One Hundred Thousand Dollars ($100,000), in case she shall survive me.

Fifth. I also give and bequeath to my said wife, Pauline Rogers, in case she survives me, all my automobiles, carriages, horses, harness or other equipment thereunto belonging.

Sixth. In case my son, Henry Huddleston Rogers, Jr., (hereinafter referred to as Henry) shall survive me, I give and bequeath to my Trustees hereinafter named a sum in cash or securities of a market value as of the date of my decease of Five Hundred Thousand Dollars ($500,000), upon trust, to
95 hold, invest, reinvest and manage the same during the lifetime of Henry, and to pay the net annual income to Henry in substantially equal quarterly instalments in each year, and upon the death of Henry I give, devise, and bequeath the principal of the trust fund together with any accrued and unpaid income to my heirs at law and next of kin in the shares in which they would respectively be entitled to inherit the same under the laws of New York in force at the date of the death of Henry.

Seventh. I give and bequeath to Peter, in case he shall survive me, a legacy of One Hundred Thousand Dollars ($100,000.); also all of my wearing apparel, personal jewelry, personal bric-a-brac and personal ornaments, also all the contents, in the way of personal property in my summer residence known as the Beach House, at Southampton, including all farm and gardening equipment and supplies of every kind and nature on such place; also my great-great-grandfather Gifford's grandfather clock and the pistols which he carried in the American Revolution and his four-poster bed and also the pastel picture of my great-grandfather Huddleston and his seal and also my saber and my medals and my helmet; absolutely and forever.

Eighth. I give and bequeath to my daughter, Mary Millicent Ramos (hereinafter referred to as Millicent), a legacy of One Hundred Thousand Dollars ($100,000.), in case she shall survive me.

Ninth. I give and bequeath to the following persons
96 the following legacies respectively, upon condition that except as hereinafter otherwise provided, in each case the legatee shall be in my employ at the time of my death, and upon condition that during my life I shall not have made other financial provision to take effect after my death for the benefit of such legatee:

(1) To Fred Douglas Scott, of the Borough of Brooklyn, City and State of New York, a legacy of Twenty-five hundred dollars ($2500.).

(2) To Brook Emanuel, my chauffeur, a legacy of Twenty-five hundred dollars ($2500.).

(3) To Keeble W. Pipe, my valet, a legacy of Twenty-five hundred dollars ($2500.).

(4) To William Macauley, my carpenter, a legacy of Twenty-five hundred dollars ($2500.).

In case Helen M. Bemis shall survive me, I give and bequeath to her, whether or not in my employ at the time of my death, a legacy of Twenty-five hundred dollars ($2500.).

Tenth. In case my wife Pauline survives me, I give, devise and bequeath to my Trustees, in trust, for my wife Pauline, the real estate and premises, with the buildings and improvements thereon, situated in the Town of Southampton, County of Suffolk, State of New York, and generally known as the Port of Missing Men and Cow Neck property, intending thereby to include all the real estate and premises situated in the Town of Southampton, County of Suffolk, State of
97 New York, formerly owned by Sebonac Company of New York, Inc., a domestic corporation, of which I may die seized, together with its contents, furniture, ornaments, plate, silver, china, linen and all household stores and equipment, except as herein specifically otherwise bequeathed, and together with all equipment, farm utensils and garage utensils, of every kind and nature whatsoever, all of which is collectively termed the North Sea property.

I direct that the North Sea property be held by my Trustees in trust for my wife Pauline, during her life, with the right to my wife Pauline to use, occupy and enjoy the same. My wife Pauline shall, within a period of 180 days after the probate of my will and the qualification of one or more of my Executors thereunder, notify my Trustees in writing of her desire to occupy said property or such part thereof as she may designate in such written notification. Upon the death of my wife Pauline, or in case of her failure to give my Trustees the notification aforesaid, prior to the expiration of a period of 180 days after the probate of my will and the qualification of one or more of my Executors thereunder, whichever event shall first happen, the trust hereby created of the North Sea property for the benefit of my wife Pauline shall, without further act on the part of my Executors and or Trustees, terminate. Upon any such termination of the trust, I give, devise and bequeath said North Sea property to Peter, in case he shall then be alive.

98 Anything herein contained to the contrary notwithstanding, in case my wife Pauline shall cease to occupy said North Sea property, or such part thereof as she shall have specified in the written notification to be given by her to my

Trustees as hereinbefore provided, for a period of two years, or shall have notified my Trustees in writing that she no longer desires to use the same, or any part thereof, the trust of the North Sea property hereby created for her benefit shall, without further act by my Executors or Trustees, terminate, and thereupon I give, devise and bequeath said North Sea property to Peter, in case he shall survive.

In case upon any termination of the trust hereby created for the benefit of my wife Pauline, Peter shall not survive, I direct that said North Sea property shall become a part of my residuary estate and shall be disposed of in accordance with the provisions of article Thirteenth of this Will.

In case my wife Pauline shall not survive me, but Peter shall survive me, I give, devise and bequeath said North Sea property to Peter, to and for his own use, absolutely and forever.

In case neither my wife Pauline nor Peter shall survive me, I direct that the North Sea property shall become a part of my residuary estate and shall be disposed of in accordance with the provisions of article Thirteenth of this Will.

Eleventh. I give and bequeath to Peter, in case he survives me, as a further token of my affection, all my guns, fishing rods and shooting and fishing weapons and gear.

99 Twelfth. I hereby exercise the power or powers of disposition and appointment given to me by the will of my said father, the late Henry Huttleston Rogers, and dispose of the property subject thereto as follows:

I direct that said property be divided by my Trustees into equal shares; and

(1)

(a) In case my wife Pauline shall survive me and we shall not have been divorced or separated by judicial decree, I direct that one of said equal shares shall be set aside by my Trustees in trust, to hold, invest, reinvest and manage the same during her life and to pay over the net annual income to her in as near as may be quarterly payments in each year, and upon her death I give, devise and bequeath the principal of the trust share and any accrued income to the issue of our marriage her surviving, per stirpes and not per capita, or if no issue of our marriage survive her, then to my other issue surviving her, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive her, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of New York at the date of her death.

(b) In the event that my wife Pauline shall survive me, and we shall not have been divorced or separated by judicial decree, and my wife Pauline shall after my death remarry, I direct that the trust in respect of such portion of the principal of the equal share set aside in trust for her as shall represent in market value one-half thereof shall terminate upon the remarriage of my wife Pauline, and as to such one-half of the trust estate I give, devise and bequeath the same to the issue of my marriage with my wife Pauline surviving such remarriage, in equal shares, per stirpes and not per capita, absolutely and forever. In the event that no issue of my marriage with my wife Pauline shall survive the date of her remarriage, I give, devise, and bequeath said one-half of the principal of the trust estate to my other issue surviving the date of her remarriage, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive the date of such remarriage, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of such remarriage.

Upon the death of my wife Pauline, she having remarried, I give, devise and bequeath the remaining portion of said share held in trust for her to the issue of my marriage with my wife Pauline her surviving, per stirpes and not per capita, or in case no issue of our marriage shall survive her, then to my other issue surviving her, except Henry, per stirpes and not per capita, or in case no such other issue of mine, except Henry, shall survive her, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of her death.

(c) In case my wife Pauline shall survive me, but we shall have been divorced or separated by judicial decree, I direct that upon my death only such portion of the principal of said equal share as shall represent in market value one-fifth thereof shall be set aside by my Trustees in trust, to hold, invest, reinvest and manage the same during the life of my wife Pauline, and to pay over the net annual income to her in as near as may be quarterly payments in each year, and upon her death I give, devise and bequeath the principal of such one-fifth portion and any accrued income to the issue of our marriage her surviving, per stirpes and not per capita, or if no issue of our marriage survive her, then to my other issue surviving her, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive her, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of New York at the date of her death.

The remaining portions of said equal share as shall represent in market value four-fifths thereof I give, devise and bequeath to the issue of my marriage with my wife Pauline who shall survive me, per stirpes and not per capita, or if no issue of our marriage survive me, then to my other issue surviving me, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive me, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of New York at the date of my death.

102 (d) In case my wife Pauline shall have died before me leaving issue of our marriage surviving me, I give, devise and bequeath one of said equal shares to the issue of our marriage surviving me, per stirpes and not per capita.

(2)

In case Millicent shall survive me, I direct that one of said equal shares be set aside by my Trustees in trust, to hold, invest, reinvest and manage the same during the life of Millicent, and to pay over the net annual income thereof to her in as near as may be equal quarterly payments in each year. Upon the death of Millicent, leaving issue (other than Peter) surviving her, I give, devise and bequeath the principal of the trust share, together with any accrued and unpaid income, to such surviving issue of Millicent (other than Peter), per stirpes and not per capita. In case Millicent, having survived me, shall have died leaving no issue (other than Peter) surviving her, I give, devise and bequeath said trust share to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of the death of Millicent.

In case Millicent shall not survive me, but issue of Millicent (other than Peter) shall survive me, I give, devise and bequeath said equal share to and among the issue of Millicent surviving me (other than Peter), per stirpes and not per capita.

103 (3)

In case Peter shall survive me, I direct that one of said equal shares be set aside by my Trustees in trust, to hold, invest, reinvest and manage the same during the life of Peter, and to pay over the net annual income thereof to him in as near as may be equal quarterly payments in each year. Upon the death of Peter, leaving issue surviving him, I give, devise and bequeath the principal of the trust share, together with any

accrued and unpaid income, to the surviving issue of Peter, per stirpes and not per capita. In case Peter, having survived me, shall have died leaving no issue surviving him, I give, devise and bequeath said trust share to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of the death of Peter.

In case Peter shall not survive me, but issue of Peter shall survive me, I give, devise and bequeath said equal share to and among the issue of Peter surviving me, per stirpes and not per capita.

Thirteenth. All the rest, residue and remainder of my estate, together with any accretions thereto by reason of any legacies that may have lapsed or by reason of any portion of my estate falling in or being for any reason undisposed of, I give, devise and bequeath as follows:

I direct my Trustees to set aside the sum of Fifty
104 Thousand Dollars ($50,000) in trust to hold, invest, reinvest and manage the same during the lifetime of Bradley Sherman Dresser, a son of my said wife Pauline by a former marriage, if he shall survive me, for and during the period of his life, and to pay over the income thereof to him in equal quarterly payments for and during the period of his life, and upon his death, I give, devise and bequeath the principal of the trust fund to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York at the date of his death.

I direct my Trustees to set aside the sum of Fifty Thousand Dollars ($50,000) in trust, to hold, invest, reinvest and manage the same during the lifetime of Charles R. Dresser, a son of my said wife Pauline by a former marriage, if he shall survive me, for and during the period of his life, and to pay over the income thereof to him in equal quarterly payments for and during the period of his life, and upon his death I give, devise and bequeath the principal of the trust fund to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York at the date of his death.

The balance of my said residuary estate I direct my Trustees to divide into equal shares, and I dispose of the same as follows:

(1)

(a) In case my wife Pauline shall survive me and we
105 shall not have been divorced or separated by judicial decree, I direct that one of said equal shares shall be set

aside by my Trustees in trust, to hold, invest, reinvest and manage the same during her life and to pay over the net annual income to her in as near as may be quarterly payments in each year, and upon her death I give, devise and bequeath the principal of the trust share and any accrued income to the issue of our marriage her surviving, per stirpes and not per capita, or if no issue of our marriage survive her, then to my other issue surviving her, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive her, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of New York at the date of her death.

(b) In the event that my wife Pauline shall survive me, and we shall not have been divorced or separated by judicial decree, and my wife Pauline shall after my death remarry, I direct that the trust in respect of such portion of the principal of the equal share set aside in trust for her as shall represent in market value one-half thereof shall terminate upon the remarriage of my wife Pauline, and as to such one-half of the trust estate I give, devise and bequeath the same to the issue of my marriage with my wife Pauline surviving such remarriage, in equal shares, per stirpes and not per capita, absolutely and forever. In the event that no issue of my marriage with
106 my wife Pauline shall survive the date of her remarriage, I give, devise and bequeath said one-half of the principal of the trust estate to my other issue surviving the date of her remarriage, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive the date of such remarriage, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of such remarriage.

Upon the death of my wife Pauline, she having remarried, I give, devise and bequeath the remaining portion of said share held in trust for her to the issue of my marriage with my wife Pauline her surviving, per stirpes and not per capita, or in case no issue of our marriage shall survive her, then to my other issue surviving her, except Henry, per stirpes and not per capita, or in case no such other issue of mine, except Henry, shall survive her, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of her death.

(c) In case my wife Pauline shall survive me, but we shall have been divorced or separated by judicial decree, I direct that

upon my death only such portion of the principal of said equal share as shall represent in market value one-fifth thereof shall be set aside by my Trustees in trust, to hold, invest, reinvest and manage the same during the life of my wife Pauline,
107 and to pay over the net annual income to her in as near as may be quarterly payments in each year, and upon her death I give, devise and bequeath the principal of such one-fifth portion and any accrued income to the issue of our marriage her surviving, per stirpes and not per capita, or if no issue of our marriage survive her, then to my other issue surviving her, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive her, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of New York at the date of her death.

The remaining portions of said equal share as shall represent in market value four-fifths thereof I give, devise and bequeath to the issue of my marriage with my wife Pauline who shall survive me, per stirpes and not per capita, or if no issue of our marriage survive me, then to my other issue surviving me, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive me, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of New York at the date of my death.

(d) In case my wife Pauline shall have died before me leaving issue of our marriage surviving me, I give, devise and bequeath one of said equal shares to the issue of our marriage surviving me, per stirpes and not per capita.

108 (2)

In case Millicent shall survive me, I direct that one of said equal shares be set aside by my Trustees in trust, to hold, invest, reinvest and manage the same during the life of Millicent, and to pay over the net annual income thereof to her in as near as may be equal quarterly payments in each year. Upon the death of Millicent, leaving issue (other than Peter) surviving her, I give, devise and bequeath the principal of the trust share, together with any accrued and unpaid income, to such surviving issue of Millicent (other than Peter), per stirpes and not per capita. In case Millicent, having survived me, shall have died leaving no issue (other than Peter) surviving her, I give, devise and bequeath said trust share to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of the death of Millicent.

In case Millicent shall not survive me, but issue of Millicent (other than Peter) shall survive me, I give, devise and bequeath said equal share to and among the issue of Millicent surviving me (other than Peter), per stirpes and not per capita.

(3)

In case Peter shall survive me, I direct that one of said equal shares be set aside by my Trustees in trust, to hold,
109 invest, reinvest and manage the same during the life of Peter, and to pay over the net annual income thereof to him in as near as may be equal quarterly payments in each year. Upon the death of Peter, leaving issue surviving him, I give, devise and bequeath the principal of the trust share, together with any accrued and unpaid income, to the surviving issue of Peter, per stirpes and not per capita. In case Peter, having survived me, shall have died leaving no issue surviving him, I give, devise and bequeath said trust share to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of the death of Peter.

In case Peter shall not survive me, but issue of Peter shall survive me, I give, devise and bequeath said equal share to and among the issue of Peter surviving me, per stirpes and not per capita.

Fourteenth. During the minority of Peter, my Trustees shall pay over or apply to his use only so much of the net annual income from his trust share or portion as may be appropriate for his suitable maintenance, education and support, and shall accumulate the balance thereof until Peter shall attain the age of 21 years. Upon Peter attaining the age of 21 years, my Trustees shall pay over to him the accumulations of income, if any, and thereafter shall pay to him the net annual income from his share or portion as hereinbefore directed. Dur-
110 ing the minority of Peter, my Trustees may, instead of making personal application of income to his maintenance, education and support, pay such income to the guardian of Peter, in such amounts and at such times as such guardian may in writing request, and my Trustees shall be under no duty to oversee or supervise in any way the use or application by any such guardian of any payments so made, but shall be fully protected by the written receipt of such guardian from accountability or liability to anyone who may now or hereafter be interested in my estate.

Fifteenth. Inasmuch as I have made what I consider adequate provision for my son Henry by article Sixth of this will,

I direct that wheresoever in articles Twelfth and Thirteenth I have given, devised or bequeathed any share or portion or portions of a share to my issue or to my heirs at law or next of kin, such terms, wheresoever or howsoever used in articles Twelfth and Thirteenth, shall not include but shall exclude my son Henry from participation in any such gift, bequest or devise, and the same shall vest in my issue, heirs at law and, or next of kin other than my son Henry as though he had not survived me.

Sixteenth. In case any trust hereby declared in respect to any share or portion or subdivision or part of my property or of any property over which I may be or become en-
111 titled to exercise power or powers of appointment (whether by the will of my father, the late Henry Huttleston Rogers, or otherwise) shall be or shall be determined by decree of a Court having jurisdiction thereof to be invalid, I do hereby give, devise and bequeath the principal of the share, portion, subdivision or part in respect to which such trust shall be, or shall be determined to be invalid, to the person or persons for or during whose life the same was directed to be held in trust, and I direct my Trustees to transfer, assign and pay over the same to such persons accordingly without holding the same in trust.

Seventeenth. I direct that all inheritance, transfer, legacy, succession or similar duties or taxes which shall become payable in respect of any property or interest passing under this my last will and testament or any codicil hereto I may make hereafter, shall be paid out of the capital of my residuary estate.

Eighteenth. I direct that in case any litigation whatever shall arise in respect to this my last will and testament or as to any of its provisions or as to its probate or concerning the trusts hereby created, or any of them, all the costs, disbursements and allowances awarded by the Court to all the parties concerned in such litigation, and also all the costs, disbursements, counsel fees and expenses of every name, nature and description, which may be expended or incurred by the
112 Executors of or the Trustees under this my will in defending or preparing to defend any such legal proceedings, or in taking advice with respect to their rights and duties concerning the same, or with respect to the construction of this my will, or any question growing out of or arising therefrom, shall be charged against and deducted from the amount devised and bequeathed under this my will in trust or otherwise to or for the benefit of the person or persons commencing or assisting in the prosecution of such legal proceed-

ings against the said Executors and Trustees, and shall be considered as so much money paid to such persons or applied to their use, with like effect, in every respect as if the same amount of money or its equivalent had been paid, transferred or conveyed directly to them by my said Executors and Trustees. The statement of the amounts expended or incurred by my Executors or Trustees as aforesaid, shall be accepted as conclusive upon any accounting by them with respect thereto, both as to the reasonableness of any counsel fees paid and as to the correctness of all payments made or incurred.

Nineteenth. As it may be inadvisable or undesirable, by reason of the character of the property or some of it, hereby disposed of, to actually set apart separate shares in respect of each of the trusts hereinabove provided for, I direct and empower my Trustees, if in their judgment it seems desir-
113 able so to do, but they shall not be obliged so to do except in their absolute discretion, to hold the estate or such portion as they may determine, as an undivided whole, and to pay over the income thereof in the proportions above recited, with the same force and effect as though there had been an actual division of my said estate into the different shares hereinbefore provided. The power so given to my Trustees shall not, however, in any way affect or limit the estates devised or bequeathed in any provision of this my will or the vesting of the same, or defer the actual transfer or payment of the same to the respective persons entitled thereto upon the happening of the respective events and at the respective times hereinbefore provided, but in any such case I direct that such payment or transfer be made and that the Trustees shall have the power in their discretion, but shall not be obliged, to hold the remainder of the estate undivided if in their judgment it seems desirable so to do. In paying over or transferring any such portion of my estate, I direct that the same be made in kind, if possible, so as to avoid partition of any real estate or a sale of any personal property, and I authorize and empower my Trustees accordingly to equalize any such distribution by use of any part of my real or personal estate or of the proceeds of any sale or investment or reinvestment thereof; and the judgment of my Trustees in respect of the value of both real and personal property and of any share or portion of my estate shall be final and
114 conclusive and shall not be subject to review by the person or persons entitled to such payment, nor shall my Trustees be accountable therefor.

Twentieth. I hereby authorize and empower my Trustees to receive from my Executors stocks, securities or other prop-

erty in lieu of cash, and it is my desire that my Executors turn over to my Trustees any stocks or securities or other property of which I may die possessed, without converting the same into cash, and that such stocks, securities or other property shall be so received by my Trustees and may be held by them with the same force and effect as though the said stocks and securities had been converted into cash by my Executors, and the cash resulting therefrom turned over to my Trustees.

Twenty-first. It is my desire that in respect of any of the trust estates by this my last will and testament created, my Executors and Trustees shall set aside in the establishment of any or all of the trust estates, and shall retain and hold upon any of the trusts hereby created any stocks or securities or other property which I may leave at the time of my death, and I give my Trustees full discretion in this regard and full power to determine the value or valuation of the same, and they shall not be liable for any error of judgment in making any such division or setting aside or valuation in the creation of any trust fund or by reason of any depreciation of
115 any of the stocks or securities or other property possessed by me at my death, and any valuation set upon any stocks or securities or other property by them shall be conclusive upon all persons claiming to share in my estate.

Twenty-second. I authorize and empower my Trustees, from time to time, in the event of the maturity of the principal of or liquidation of any stocks or securities, that may at any time constitute any of the trust estates herein provided for, or, if in their judgment it seems advisable, in case of the sale of any of the stocks or securities under the power of sale hereinafter set forth, to invest all or any part of the proceeds received, in such securities, shares of stock or other property as they in their discretion may deem advisable, and from time to time to sell the same and in like manner to reinvest the proceeds in their discretion, without limiting them in respect of any such investments or reinvestments to such investments as may by law permitted to be made by trustees, and they shall not be liable or accountable for any error of judgment in making any such investment or reinvestment, or for any depreciation in the value or market price of any shares of stock, securities, or other investments or reinvestments made by them at any time forming a part of any of the trust estates herein created, or for any loss that may be occasioned by reason of any investment or reinvestment made by my said Trustees hereunder.

116 I direct that my Trustees shall not be required to establish any sinking fund for the amortization of any

premium paid on the purchase of any investments or reinvestments of my estate or any part thereof.

Twenty-third. I give my Executors and Trustees full power and authority from time to time to sell or dispose of all or any part of my real or personal estate, or any investment or reinvestment thereof, at public or private sale, and at such price and upon such terms and subject to such conditions as they shall deem best; and on any such sale to make, execute and deliver good and sufficient deeds or instruments of conveyance or transfer to the purchaser or purchasers; and I do further give and grant to my Trustees, their successor or successors, full power and authority to partition, lease and mortgage any and all real or personal property that may at any time constitute any part of my estate or of the trusts hereinbefore created, with further power to renew or extend any mortgage and or to foreclose the same and to purchase any mortgaged property at foreclosure sale, and to hold, lease, manage and dispose of the same.

I authorize and empower my Trustees to become parties to any reorganization of any of the corporations, the stocks or securities of which may at any time constitute any of the trust estates herein provided for, and to participate in such reorganization to the same extent and as fully and
117 completely as I might do, and to receive upon any such reorganization in lieu of stocks or other securities, and to continue to hold in trust, such distribution of property or assets as may be provided by the terms thereof, without accountability therefor on the part of my Trustees.

I give my Executors and Trustees full power and authority to cause any stocks or securities at any time held in trust, to be registered in the name of the nominee or nominees of my Trustees; to exercise conversion or subscription rights appurtenant to any stocks, bonds or other securities at any time held in trust, and to use such portion of the principal of the trust estate as may be necessary therefor, or in the discretion of my Trustees, to sell any such rights. All extraordinary stock dividends and all realized appreciation in the value of stocks, bonds, securities or other property, resulting from the sale or other disposition thereof, shall be considered principal and not income, but ordinary stock dividends paid regularly by a corporation in lieu of, or in addition to regular cash dividends, shall be considered income and not principal, provided, however, that my Trustees' determination as to whether any stock dividend is ordinary or extraordinary, and their determination as to whether any stock dividend should be apportioned or set aside in whole or in part to principal or income, shall be con-

clusive and binding upon all persons now or hereafter interested in the trust estate.

118 Twenty-fourth. I empower the acting Executors or Executor for the time being of this my Will to pay and satisfy, or compromise or compound, any debts owing or claimed to be owing by or from me or my estate, and any liability to which I or my estate may be or may be alleged to be subject, and to accept any composition or any security, real or personal, for any debts owing to me or my estate, and to allow such time for the payment of any such debt or composition (either with or without taking security for the same) as to them shall seem reasonable, and to refer to arbitration and settle all debts, accounts, and controversies which may arise in respect to my estate, and generally to act in relation to the premises in such manner as they shall think expedient, without being liable for any loss occasioned thereby.

Twenty-fifth. I authorize and empower my Executors and/or my Trustees who may from time to time be qualified and acting as such, in their uncontrolled discretion, to appoint one or more associate and/or successor Trustees, who may be individuals and/or corporations and domiciled or located in any other State or in any foreign country, and to transfer, assign and set over to them the whole or any part of the property belonging to my estate, whether held in trust or otherwise, to be held and administered in such foreign jurisdiction by such associate or successor Trustee or Trustees, but

119 upon and in accordance with the terms and provisions of this Will. Any such appointment may be made by the execution by a majority of my Executors and/or Trustees at the date of such appointment qualified and acting as such, of a written instrument executed with the formalities required by law in respect to a deed of real estate, and any such instrument may include the resignation of one or more of the Executors and/or Trustees appointed by this Will and who shall have exercised said power of appointment, and shall become effective in accordance with the terms thereof upon acceptance of the appointment by the associate and/or successor Trustees therein appointed. Thereupon, my estate or the part of it so disposed of shall be transferred, assigned and set over to such associate and/or successor Trustees by such instruments of transfer as may be appropriate, and shall thereafter be held and administered in such other State or such other foreign country as may be specified in the instrument of appointment, but upon the trusts hereby declared, and the functions, duties, and responsibilities of my Executors and/or Trustees theretofore qualified and acting as such shall thereupon

cease and determine insofar as they may resign or renounce the same by such instrument of appointment, and they shall not be or become liable or accountable to any person now or hereafter interested in my estate for the further custody or administration of my estate or the part thereof so transferred, or under any duty or responsibility to supervise the actions of the associate or successor Trustees.

120 Twenty-sixth. I also authorize and empower my Executors and/or my Trustees who may from time to time be qualified and acting as such, in their uncontrolled discretion, to terminate any of the trusts created by this Will and to transfer, assign and pay over the whole or any part of the principal of any share or portion to the beneficiary of such share or portion who may be at the time of such payment entitled to receive payment of the annual income therefrom, and any payment or payments so made shall operate to terminate the trusts hereby created in respect to the share or portion so paid over, and terminate the rights and interests of any person or persons, remaindermen or otherwise thereafter to receive the same or to enjoy the income therefrom, anything in this Will to the contrary notwithstanding; and upon making any such payment or payments my Executors and/or Trustees shall, by the written receipt of the person to whom such payment or payments are so made, be released from further accountability or liability therefor to any person now or hereafter interested in my estate. Any payment or payments may be made upon the determination of the majority of my Executors and/or Trustees at the date of such payment or payments qualified and acting as such.

Twenty-seventh. I appoint my friend Adrian H. Larkin, my friend Albert Stickney and Central Hanover Bank and Trust Company, to be the Executors of and Trustees under this my Last Will and Testament.

121 In the event of any vacancy among my Trustees, for any reason whatsoever, if my then qualified Trustees shall unanimously agree upon a successor Trustee and shall execute such an appointment in writing, duly acknowledged as in the case of deeds for the transfer of real estate in the State of New York, thereupon the said successor shall become a Trustee under this my Last Will and Testament, but if my said Trustees shall within sixty days after a vacancy occurs among my Trustees, fail to unanimously agree upon and appoint a successor Trustee, then any Trustee or any party in interest may make an application to any Judge of the Supreme Court of the State of New York for the designation of a successor Trustee.

It is my desire that at the time of the qualification of any successor Trustee herein named, or at the time of the unanimous selection by my Trustees of a successor or at the time of the appointment by any Judge of the Supreme Court of a successor Trustee, the remaining Trustees shall forthwith give notice to every adult person having any interest in the trusts created by this my Last Will and Testament of such appointment.

I direct that my Executors and Trustees, their successors or successor, shall not nor shall any of them be required to give any bond or other security for the faithful performance of this trust, even though so required by the laws of any State in which I may have property, and notwithstanding the provisions in that regard of the laws of any such State.

122 Wherever in this my Last Will and Testament I have referred to my Executors and/or Trustees, such expression shall be taken to include any successors or successor Executor and/or Trustee.

I direct that any successors or successor Executor and/or Trustee shall be vested with title to all my property with the surviving or continuing Executors and/or Trustees hereunder jointly.

I direct that any successors or successor Executor and/or Trustee shall have all of the rights, powers and authority, discretionary or otherwise, in this my Will given to or conferred upon the Executors and Trustees herein named.

In case any difference of opinion shall at any time arise between my said Executors, or between my said Trustees in regard to any matter pertaining to the discharge of their duties under any of the trusts or powers given herein, the decision of a majority of my said Executors or of my said Trustees shall be binding and conclusive, it being my wish and intention that the acts and proceedings of a majority shall for all the purposes of this my Will be taken as the acts and proceedings of the entire body of Executors or Trustees, except, however, insofar as pertains to the action in respect of the appointment of a successor Trustee, as hereinbefore provided.

In Testimony Whereof, I, Henry H. Rogers, have hereunto set my hand and seal to this my Last Will and Testament, consisting of twenty-five typewritten pages, this 13th

123 day of January, in the year One thousand nine hundred and thirty-four (1934).

HENRY H. ROGERS. [SEAL]

Signed, Sealed, Published and Declared by the above named Testator, Henry H. Rogers, as and for his last Will and Testa-

ment, in the presence of us and of each of us, who, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses, this 13 day of January, 1934.

ORSON D. MUNN,
Southampton, L. I., N. Y.
DAVID WAGSTAFF,
Tuxedo, New York.
P. L. BEHRENDT,
Southampton, N. Y.

Proved Oct. 28, 1935.
Recorded in Suffolk County Surrogate's Office in Liber of Wills at page—.

STATE OF NEW YORK,
Suffolk County, Surrogate's Court, ss.:

I, John D. Hallock, Clerk of the Surrogate's Court of said county, do hereby certify that I have compared the foregoing copy of the Will of Henry H. Rogers, deceased, with the original record thereof, now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of the said original record. In testimony whereof, I have hereunto set my hand and affixed the seal of office of said Surrogate, the 1st day of November in the year of our Lord one thousand nine hundred and thirty-five.

[L. S.] JOHN D. HALLOCK,
Clerk of the Surogate's Court.

124 *Exhibit D*

SURROGATE'S COURT, COUNTY OF NEW YORK

DECREE WITH NOTICE OF ENTRY

No File Number

In the Matter of the Judicial Settlement of the Account of Proceedings of City Bank Farmers Trust Company (formerly The Farmers' Loan and Trust Company), Adrian H. Larkin and William R. Coe, as Trustees of the Trust Created for the Benefit of Henry H. Rogers, Jr., under Article Eighth of the Last Will and Testament of Henry H. Rogers, Deceased

SIRS: Please take notice that the within is a true copy of a decree in the above-entitled proceeding, duly made and entered

in the Office of the Clerk of the Surrogate's Court of New York County on the 12th day of January, 1939.

Dated, New York, N. Y., January 13, 1939.

Yours, etc.,

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for City Bank Farmers Trust Company, Adrian H. Larkin and William R. Coe, as Trustees, etc., Petitioners, 15 Broad Street, Borough of Manhattan, City of New York.

To:

SPENCE, HOPKINS, WALSER & HOTCHKISS, Esqs.,
Attorneys for Pauline Hoving,
40 Wall Street, New York, N. Y.

SIMPSON, THATCHER & BARTLETT, Esqs.,
Attorneys for Mary Millicent Balcom,
120 Broadway, New York, N. Y.

STEPHEN P. NASH, Esq.,
Special Guardian for Ramos Infants,
15 Broad Street, New York, N. Y.

125 JOHN CALDWELL MYERS, Esq.,
General Guardian of Peter A. C. M. Salm,
295 Madison Avenue, New York, N. Y.

LARKIN, RATHBONE & PERRY, Esqs.,
Attorneys for Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney, as Executors and Trustees under the Will of Henry H. Rogers, Jr., deceased.
70 Broadway, New York, N. Y.

SHEARMAN & STERLING, Esqs.,
Attorneys for City Bank Farmers Trust Company, as Executor of the Estate of John W. Sterling, deceased.
55 Wall Street, New York, N. Y.

WHITE & CASE, Esqs.,
Attorneys for The New York Trust Company,
14 Wall Street, New York, N. Y.

COUDERT BROTHERS, Esqs.,
Attorneys for Massachusetts Bonding & Insurance Company,
2 Rector Street, New York, N. Y.

SAGE, GRAY, TODD & SIMMS, Esqs.,
Appearing Personally,
40 Wall Street, New York, N. Y.

MITCHELL, TAYLOR, CAPRON & MARSH, Esqs.,
Appearing Personally,
20 Exchange Place, New York, N. Y.

JEROME M. HERSCH, Esq.,
Attorney for State Tax Commissioner,
80 Centre Street, New York, N. Y.

TIMOTHY J. HEALY, Esq.,
Attorney for Henry Huddleston Rogers, Jr.,
521 Fifth Avenue, New York, N. Y.

126 At a Surrogate's Court held in and for the County of New York, at the Hall of Records, in the Borough of Manhattan, City, County, and State of New York, on the 12th day of January 1939.

Present: Honorable JAMES A. FOLEY, Surrogate.

DECREE SETTLING ACCOUNT OF TRUSTEES

No. File Number

In the Matter of THE JUDICIAL SETTLEMENT OF THE ACCOUNT OF PROCEEDINGS OF CITY BANK FARMERS TRUST COMPANY (FORMERLY, THE FARMERS' LOAN AND TRUST COMPANY), ADRIAN H. LARKIN AND WILLIAM R. COE, AS TRUSTEES OF THE TRUST CREATED FOR THE BENEFIT OF HENRY H. ROGERS, JR., UNDER ARTICLE EIGHT OF THE LAST WILL AND TESTAMENT OF HENRY H. ROGERS, DECEASED

City Bank Farmers Trust Company, Adrian H. Larkin and William R. Coe having filed in this Court a verified petition praying that their account of proceedings as trustees of the trust created for the benefit of Henry H. Rogers, Jr., under Article Eighth of the last will and testament of Henry H. Rogers, late of the County of New York, deceased, be judicially settled and allowed and that the Court determine the validity, construction and effect of the provisions of the Will of said Henry H. Rogers, Jr., deceased, insofar as they affect the distribution of said trust fund and particularly the provisions by which said Henry H. Rogers, Jr. exercised the power of appointment granted him under the Will of Henry H. Rogers, deceased, and

further that the Court determine the persons entitled to receive the distribution of the principal and income of said trust fund now in the hands of said trustees and the respective rights and interests of such persons therein;

And a citation having been issued thereon directed to all persons interested or claiming to be interested in said trust fund or required to be cited by law, citing them and each of them to show cause before the Surrogate's Court of New York County held at the Hall of Records in the County of New York, on the 28th day of September 1937, at half past ten o'clock in the forenoon of that day why said account should not be judicially settled and why said will should not be construed and a determination had of the persons entitled to receive distribution of said trust fund as prayed for in said petition, and said citation having been returned with proof of due service thereof on Mary Millicent Balcom (also known as Millicent Rogers Balcom), Peter Alfred Constantin Maria Salm, Arturo Henry Peralta Ramos, Paul Jaime Peralta Ramos,
Henry Huddleston Rogers, Jr., Adrian H. Larkin, as
127 executor of and trustee under the last will and testament of Henry H. Rogers, Jr., deceased, Albert Stickney, as executor of and trustee under the last will and testament of Henry H. Rogers, Jr., deceased, Central Hanover Bank and Trust Company as executor of and trustee under the last will and testament of Henry H. Rogers, Jr. deceased, City Bank Farmers Trust Company, as sole surviving executor of the estate of John W. Sterling, The New York Trust Company, and Massachusetts Bonding and Insurance Company;

And a supplemental citation having been issued herein directed to Henry Huddleston Rogers, Jr. citing him to show cause before the said Surrogate's Court to be held at the Hall of Records in the County of New York on the 5th day of November 1937, at half past ten o'clock in the forenoon of that day why the said account should not be so judicially settled and why the said will should not be so construed and a determination had of the persons entitled to receive distribution of said trust fund as prayed for in said petition, and the said supplemental citation having been returned with proof of due service thereof on said Henry Huddleston Rogers, Jr.;

And Pauline Hoving, the law partnership of Messrs. Sage, Gray, Todd & Sims, the State Tax Commission and the law partnership of Messrs. Mitchell, Taylor, Capron & Marsh having appeared herein either personally or by authorized notices of appearance duly acknowledged and filed herein:

And the matter having come on to be heard before this Court on the return day of said citation and having been adjourned

to the return day of said supplemental citation, and the petitioners having appeared herein by their attorneys, Messrs. Davis Polk Wardwell Gardiner & Reed, and having rendered, under oath, before the said Surrogate their account of proceedings as trustees of the trust created for the benefit of Henry H. Rogers, Jr. under Article Eighth of the last will and testament of Henry H. Rogers, deceased, to the 30th day of January 1937, and said account having been filed and the said petitioners thereafter having rendered, under oath, a supplemental account of their proceedings as such trustees, to the 6th day of October 1937, and a second supplemental account of their said proceedings to the 3rd day of November 1938, and a supplemental affidavit of Samuel R. Walker sworn to the 3rd day of January 1939, which said supplemental accounts and affidavit having been duly served upon all parties to this proceeding and filed herein, and the issuance of a supplemental citation having been waived by all parties, subject to the approval of the Surrogate as to the infant parties to this proceeding;

And the several respondents in this proceeding having appeared by counsel herein, as follows: Pauline Hoving, by her attorneys, Messrs. Spence, Hopkins, Walser & Hotchkiss; Mary Millicent Balcom (also known as Millicent Rogers Balcom), by her attorneys, Messrs. Simpson, Thacher & Bartlett; Henry Huddleston Rogers, Jr., by his attorney, Timothy J. Healy, Esq.; Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney, by their attorneys, Messrs. Larkin, Rathbone & Perry; City Bank Farmers Trust Company, as sole surviving executor of the estate of John W. Sterling, deceased, by its attorneys, Messrs. Shearman & Sterling; The New York Trust Company, by its attorneys, Messrs. White & Case, and Massachusetts Bonding and Insurance Company, by its attorneys, Messrs. Coudert Bros.; and Messrs. Sage, Gray, Todd & Sims, and Messrs. Mitchell, Taylor, Capron & Marsh having appeared herein, respectively, in person; and the State Tax Commission having appeared herein by its attorney Edgar A. Hirschberg, Esq., for whom was substituted subsequently Jerome M. Hirsch, Esq.;

128 And Stephen P. Nash, Esq., having been appointed as special guardian for the infant respondents Arturo Henry Peralta Ramos and Paul Jaime Peralta Ramos and having duly qualified as such special guardian; and John Caldwell Myers, Esq., co-general guardian of Peter Alfred Constantin Maria Salm, an infant respondent, having appeared herein on behalf of his ward;

And respondent City Bank Farmers Trust Company, as sole surviving executor of the estate of John W. Sterling, a deceased trustee of said trust fund, having filed an answer herein, verified November 17, 1937, praying that Section 2 of the account of proceedings dated July 5, 1918, and filed herein be judicially settled and allowed as the account of proceedings of John W. Sterling, deceased, as a trustee of said trust fund; and there being no objections on the part of any party to the relief prayed for in said answer;

And respondent Mary Millicent Balcom (also known as Millicent Rogers Balcom) having filed an answer and objections herein, verified November 19, 1937, objecting to the commissions claimed by the accounting trustees and to the attorneys' fees paid by them, and said objection to the attorneys' fees, being objection numbered 2 of said objections, having been withdrawn by stipulation of counsel for the accounting trustees and for said respondent dated May 24, 1938, and filed herein, and the commissions of said accounting trustees being adjusted and allowed, as hereinafter determined in this decree;

And respondents Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney, as executors of and trustees under the last will and testament of Henry H. Rogers, Jr., deceased, having filed an answer herein, verified November 19, 1937, contending that the power of appointment granted said Henry H. Rogers, Jr., under the will of Henry H. Rogers, deceased, of the trust fund herein accounted for was validly exercised by the last will and testament of said Henry H. Rogers, Jr., deceased, but invoking the equitable doctrine of marshalling, in the event that it should be determined that the appointment in further trusts contained in said will of Henry H. Rogers, Jr., deceased, of the funds herein accounted for is to any extent invalid to the end that the entire appointed fund should be paid to the respondents as trustees under the last will and testament of said Henry H. Rogers, Jr., deceased, and further praying that provision be made in the decree to be entered herein for payment out of the trust fund accounted for of its proportionate share of any New York and Federal Estate taxes, of certain amounts assigned to said respondents by Pauline Hoving, and of all accrued income of said trust fund to the date of death of said Henry H. Rogers, Jr., the life beneficiary of said trust fund;

And said Stephen P. Nash, Esq., special guardian for the infant respondents herein, Arturo Henry Peralta Ramos and Paul Jaime Peralfa Ramos, having filed herein his report dated May 27, 1938, and his supplemental report dated Janu-

ary 9, 1939, and an answer contending that the power of appointment granted said Henry H. Rogers, Jr., under the will of Henry H. Rogers, deceased, of the trust fund herein accounted for was validly exercised by the last will and testament of said Henry H. Rogers, Jr., deceased, but invoking the equitable doctrine of marshalling, in the event that it should be determined that the appointment in further trusts, contained in said will of Henry H. Rogers, Jr., deceased of the funds herein accounted for is to any extent invalid, and said special guardian also having filed objections to said account, verified the
129 2nd day of June 1938, claiming that certain amounts received by said trustees were improperly credited to principal and said trust fund instead of to income, and that certain amounts paid out by said trustees were improperly paid from income instead of from principal, raising certain questions as to the propriety of the making or retention of certain investments on the part of the accounting trustees and requesting a determination as to whether the provisions of Article Second of the last will and testament of Henry H. Rogers, deceased, created a trust, an annuity or a charge upon the residuary estate of said deceased in favor of his widow Emilie R. Rogers, deceased;

And said John Caldwell Myers, Esq., having filed a general guardian's answer herein on behalf of his ward Peter Alfred Constantin Maria Salm, an infant, and also having filed herein his report dated January 4, 1939, approving said account and supplemental accounts and affidavit filed herein;

And respondent Henry Huddleston Rogers, Jr., having filed an answer herein, verified November 11, 1937, under the name of Henry H. Rogers, asking a determination that said Henry H. Rogers, Jr., did not validly exercise the power of appointment granted him under the last will and testament of said Henry H. Rogers, deceased, and that the trust fund herein accounted for passes under the provisions of Article Eighth of the last will and testament of said Henry H. Rogers, deceased, to said Pauline Hoving, Henry Huddleston Rogers, Jr., and Mary Millicent Balcom as the only heirs at law of Henry H. Rogers, Jr., deceased, as in the case of the inheritance of real property according to the laws of the State of New York;

And replies to said answer of Henry Huddleston Rogers, Jr. having been filed herein as follows: By the petitioners City Bank Farmers Trust Company, Adrian H. Larkin and William R. Coe, as trustees of said trust fund, verified by said trustees, respectively, on November 30, 1937, November 24, 1937, and December 6, 1937, submitting the issues raised by said answer to the determination of this Court; by respondents Central

Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney, as executors of and trustees under the last will and testament of Henry H. Rogers, Jr., deceased, verified November 29, 1937, praying that said answer be dismissed; by respondent Mary Millicent Balcom (named in said reply as Millicent Rogers Balcom) verified November 26, 1937, praying that the exercise of the power of appointment contained in the will of said Henry H. Rogers, Jr., deceased, be held valid and that the equitable doctrine of marshalling be invoked, if necessary, to carry out the provisions of said will; and by respondent Pauline Hoving, verified November 30, 1937, praying that said answer of Henry Huddleston Rogers, Jr., be dismissed;

And said respondent Pauline Hoving having moved this Court on an affidavit sworn to by her on March 24, 1938, by order to show cause dated March 25, 1938, and returnable March 29, 1938, for an order dismissing said answer and objections of said respondent Henry Huddleston Rogers, Jr., and said motion having duly come on to be heard before the Surrogate, and the Surrogate having heard arguments of counsel and having read the papers submitted in support of and opposed to said motion; and having made and filed his decision in writing dated May 23, 1938, and an order having been duly made and entered herein dated May 27, 1938, striking out the entire answer and all objections of said respondent
130 Henry Huddleston Rogers, Jr. and said Henry Huddleston Rogers, Jr. having taken an appeal to the Appellate Division, First Department of the Supreme Court of the State of New York, from said order and said appeal having been dismissed by order of said Appellate Division, First Department, duly made and entered dated October 7, 1938;

And certain of the parties to this proceeding, to wit, the petitioners City Bank Farmers Trust Company, Adrian H. Larkin and William R. Coe, as trustees of said trust fund, Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney, as executors of and trustees under the last will and testament of Henry H. Rogers, Jr., deceased, Peter Alfred Constantin Maria Salm, Arturo Henry Peralta Ramos, Paul Jaime Peralta Ramos, Mary Millicent Balcom (also known as Millicent Rogers Balcom) and Pauline Hoving having agreed to compromise and settle certain of the issues and controversies between them as raised by the pleadings filed herein subject to the approval of this Court and a written agreement of compromise dated July 27, 1938 having been entered into by and between the adult and corporate parties

above named, compromising and settling said issues and controversies, and said agreement having been submitted to the Surrogate together with a petition of the accounting trustees, to wit, City Bank Farmers Trust Company, Adrian H. Larkin, and William R. Coe, verified by said trustees, respectively, on September 6, 1938, August 31, 1938, and October 13, 1938, praying that the Court ratify and approve said compromise agreement and authorize its execution by a special guardian or guardians on behalf of all the infant parties thereof, and also on behalf of persons unknown who, and persons not in being who, if and when born, will constitute heirs at law and next of kin of said Henry H. Rogers, deceased, under the laws of the State of New York in force upon the date of death of said Peter Alfred Constantin Maria Salm; and the Surrogate having extended the appointment of said Stephen P. Nash, Esq. as special guardian, to include the said persons unknown and unborn, and said Stephen P. Nash, Esq., having filed a report herein dated November 3, 1938, approving the said compromise agreement, and said John Caldwell Myers, Esq. as general guardian of said Peter Alfred Constantin Maria Salm having filed a report herein dated October 27, 1938, also approving the said compromise agreement, and the Surrogate having made and filed his decision in writing dated November 7, 1938, and an order having been duly made and entered herein dated November 9, 1938, approving said compromise agreement and authorizing and directing said Stephen P. Nash, Esq. and John Caldwell Myers, Esq. to enter into and execute the said compromise agreement on behalf of their respective wards; and the said compromise agreement dated July 27, 1938, having been duly signed, acknowledged and delivered by said special guardian and general guardian on behalf of their respective wards and having been filed herein;

And the matters remaining in dispute in this proceeding after the dismissal of the answer and objections of said Henry Huddleston Rogers, Jr. and the approval and execution of said compromise agreement dated July 27, 1938, having duly come on to be heard before the Surrogate on November 3, 1938; and Messrs. Davis, Polk, Wardwell, Gardiner & Reed, having appeared on behalf of petitioners City Bank Farmers Trust Company, Adrian H. Larkin and William R. Coe, as trustees of said trust fund, and John Caldwell Myers, Esq., co-general guardian of Peter Alfred Constantin Maria Salm, having appeared on behalf of his said ward, and Stephen P. Nash, Esq., special guardian of Arturo Henry Peralta Ramos and Paul Jaime Peralta Ramos, having appeared on behalf of

his said wards, and Messrs. Spence, Hopkins, Walser &
131 Hotchkiss having appeared on behalf of respondent Pauline Hoving and Messrs. Simpson; Thacher & Bartlett having appeared on behalf of respondent Mary Millicent Balcom, and Messrs. Larkin, Rathbone & Perry having appeared on behalf of respondents, Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney as executors of and trustees under the last will and testament of Henry H. Rogers, Jr. deceased, and Messrs. White & Case having appeared on behalf of respondent The New York Trust Company and Messrs. Shearman & Sterling having appeared on behalf of respondent City Bank Farmers Trust Company, as sole surviving executor of the estate of John W. Sterling, deceased trustee under the will of Henry H. Rogers, deceased; and the Surrogate having heard the proofs and arguments of counsel and having made and filed herein his decision in writing dated November 7, 1938, and his further decision in writing dated December 6, 1938;

And it appearing that said Henry H. Rogers died on May 19, 1909, a resident of the County and State of New York leaving a last will and testament dated May 7, 1907, which was duly admitted to probate in the Surrogate's Court of New York County on May 28, 1909, and that in and by Article Eighth of said will he divided his residuary estate into equal shares for his surviving children and that he provided in part with respect to the said shares as follows:

"IV. To apply the income of each share, set apart for the benefit of any child of mine, who shall not have attained the age of forty years, at the time of my death, to the use of such child, until he shall attain the age of forty years, and thereupon to convey, transfer and pay over to the said child one-half of the principal of the share set apart for the said child as aforesaid, and to apply the income of the remaining half of each such share to the use of the said child during his or her life; and, upon the death of the said child, to convey, transfer and pay over the principal thereof to such persons or corporations and in such manner as the said child shall direct by his Last Will and Testament, or, in the absence of such direction, to such persons as shall then constitute the heirs at law of the said child, as in the case of the inheritance of real property, according to the laws of the State of New York."

And it further appearing that said Henry H. Rogers left him surviving four children, of which Henry H. Rogers, Jr. was one, and that said Henry H. Rogers, Jr. was under the age of forty years at the time of the death of said Henry H. Rogers,

and that a trust fund was duly constituted and set up for the benefit of said Henry H. Rogers, Jr. in accordance with the provisions of said will and that the duly appointed and presently acting trustees of said trust fund are the petitioners and accounting parties herein, to wit: City Bank Farmers Trust Company, Adrian H. Larkin and William R. Coe, and that said trust fund is the trust fund herein accounted for;

And it further appearing that thereafter said Henry H. Rogers Jr. life beneficiary of said trust fund, attained the age of forty years on December 28, 1919, and thereupon received the one-half share of said trust fund directed to be paid to him upon attaining said age, except as to the sum of $17,914.74 which should now be paid to the executors of his estate, and that thereafter said Henry H. Rogers, Jr. died on July 25, 1935, a resident of the County of Suffolk, State of New York, leaving a last will and testament dated Jan. 13, 1934, which was duly admitted to probate by the Surrogate's Court of Suffolk
132 County on October 28, 1935, and that respondents Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney are the duly appointed and acting executors of and trustees under said will, and that in and by said will said Henry H. Rogers, Jr. purported to exercise the power of appointment granted him under the last will and testament of his father, the said Henry H. Rogers, deceased, and providing in part as follows:

"Twelfth: I hereby exercise the power or powers of disposition and appointment given to me by the will of my said father, the late Henry Huttleston Rogers, and dispose of the property subject thereto as follows:

I direct that said property be divided by my Trustees into equal shares; and

(1)

(a) In case my wife Pauline shall survive me and we shall not have been divorced or separated by judicial decree, I direct that one of said equal shares shall be set aside by my Trustees in trust, to hold, invest, reinvest and manage the same during her life and to pay over the net annual income to her in as near as may be quarterly payments in each year, and upon her death I give, devise and bequeath the principal of the trust share and any accrued income to the issue of our marriage her surviving, per stirpes and not per capita, or if no issue of our marriage survive her, then to my other issue surviving her, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive her, then to my heirs

at law and next of kin, except Henry, entitled to inherit the same under the laws of New York at the date of her death.

(b) In the event that my wife Pauline shall survive me, and we shall not have been divorced or separated by judicial decree, and my wife Pauline shall after my death remarry, I direct that the trust in respect of such portion of the principal of the equal shares set aside in trust for her as shall represent in market value one-half thereof shall terminate upon the remarriage of my wife Pauline, and as to such one-half of the trust estate I give, devise and bequeath the same to the issue of my marriage with my wife Pauline surviving such remarriage, in equal shares, per stirpes and not per capita, absolutely and forever. In the event that no issue of my marriage with my wife Pauline shall survive the date of her remarriage, I give, devise and bequeath said one-half of the principal of the trust estate to my other issue surviving the date of her remarriage, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive the date of such remarriage, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of such remarriage.

Upon the death of my wife Pauline, she having remarried, I give, devise and bequeath the remaining portion of said share held in trust for her to the issue of my marriage with my wife Pauline her surviving, per stirpes and not per capita, or in case no issue of our marriage shall survive her, then to my other issue surviving her, except Henry, per stirpes and not per capita, or in case no such other issue of mine, except Henry, shall survive her, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of her death.

* * * * *

In case Millicent shall survive me, I direct that one of said equal shares be set aside by my trustees in trust, to hold,
133 invest, reinvest and manage the same during the life of Millicent, and to pay over the net annual income thereof to her in as near as may be equal quarterly payments in each year. Upon the death of Millicent, leaving issue (other than Peter) surviving her, I give, devise and bequeath the principal of the trust share, together with any accrued and unpaid income, to such surviving issue of Millicent (other than Peter), per stirpes and not per capita. In case Millicent, having survived me, shall have died leaving no issue (other

than Peter) surviving her, I give, devise and bequeath said trust share to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of the death of Millicent.

* * * * * *

(3)

In case Peter shall survive me, I direct that one of said equal shares be set aside by my Trustees in trust, to hold, invest, reinvest and manage the same during the life of Peter, and to pay over the net annual income thereof to him in as near as may be equal quarterly payments in each year. Upon the death of Peter, leaving issue surviving him, I give, devise and bequeath the principal of the trust share, together with any accrued and unpaid income, to the surviving issue of Peter, per stirpes and not per capita. In case Peter, having survived me, shall have died leaving no issue surviving him, I give, devise and bequeath said trust share to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of the death of Peter."

And it further appearing that said Henry H. Rogers, Jr., left him surviving his said widow Pauline Rogers who later remarried on April 30, 1937, and is now known as Pauline Hoving, his said daughter Mary Millicent Balcom, and his said grandson Peter Alfred Constantin Maria Salm; all of whom are now living and that said Mary Millicent Balcom had then living two other children, to wit, Arturo Henry Peralta Ramos and Paul Jaime Peralta Ramos, both of whom are now living, and no other issue and that said Peter Alfred Constantin Maria Salm had then and has now no issue and that there was no issue of the marriage of said Henry H. Rogers, Jr., and Pauline Rogers Hoving and that said Pauline Rogers Hoving and said Mary Millicent Balcom were in being on May 19, 1909, the date of death of said Henry H. Rogers, but that said Peter Alfred Constantin Maria Salm was not in being on said date;

And it further appearing that under Articles Second and Fifth of the will of the said Henry H. Rogers, deceased, certain trust funds were created for the lives of certain beneficiaries named therein and that upon the death of said beneficiaries the remainders of said trust funds became or will become part of the residuary estate of said Henry H. Rogers, deceased, and one-fourth thereof added to the said trust fund for Henry H. Rogers, Jr. under said will being the trust fund herein accounted for, and that of the trust funds now in the hands of the accounting trustees 6.667% represents property which previously constituted part of the said trust funds under Articles Second and

Fifth of said will which already had been held in trust for two lives up to the date of death of said Henry H. Rogers, Jr. and cannot validly be held in any further trust under the exercise of the power of apointment contained in the will of said Henry H. Rogers, Jr. deceased; and it further appearing that the trust funds created under said Articles Second and Fifth of
134 said will of Henry H. Rogers, deceased, for the benefit of Marion Rogers, now Marion R. Vincent and Rowland Rogers have been separately constituted and set aside and that said life beneficiaries are still living and that said trust funds will become distributable and be accounted for only upon the deaths of the respectve life beneficiaries thereof;

And it further appearing that the respondent Pauline Hoving has made certain assignments of her interest in the trust fund herein accounted for as follows:

To The New York Trust Company by assignment dated March 17, 1936, to secure repayment to it of the sum of $50,000;

To the executors of the estate of Henry H. Rogers, Jr., deceased, by assignment dated June 3, 1936, to secure repayment to them of sums totalling $10,000;

To the executors of the estate of Henry H. Rogers, Jr., deceased, by assignment dated August 12, 1936, to secure repayment to them of sums totalling $20,000;

To Messrs. Sage, Gray, Todd & Sims by assignments dated April 16, 1936, and October 6, 1937, respectively, to secure repayment to them of the sum of $15,114.95;

To Massachusetts Bonding and Insurance Company by assignment dated December 15, 1936, to secure repayment to the executors of the estate of Henry H. Rogers, Jr., deceased, of sums totalling $30,000;

To Massachusetts Bonding and Insurance Company by assignment dated June 18, 1937, to secure repayment to the executors of the estate of Henry H. Rogers, Jr., deceased, of sums totalling $10,000;

To Messrs. Mitchell, Taylor, Capron & Marsh by assignment dated April 29, 1938, to secure repayment to them of the sum of $44,553.82;

To Oswald W. Knauth by assignment dated August 31, 1938, to secure repayment to him of the sum of $10,562.53; and that said Pauline Hoving has consented that the amounts due under said assignments together with interest thereon where provided for shall be paid from the principal and income of said trust fund due her under this decree and that such provision for such repayment should be made herein;

Now, therefore, it is hereby ordered, adjudged, and decreed as follows:

1. That Henry Huddleston Rogers, Jr., has no interest in the trust fund herein accounted for and that the order dismissing his answer and objections dated May 27, 1938, be and the same hereby is in all respects ratified, approved and confirmed.

2. That the compromise agreement dated July 27, 1938, compromising and settling certain issues in this proceeding and the order approving the same dated November 9, 1938, be and the same hereby is in all respects ratified, approved and confirmed.

3. That the withdrawal of the contentions of Stephen P. Nash, Esq., special guardian of Arturo Henry Peralta
135 Ramos and Paul Jaime Peralta Ramos and of the executors of the estate of Henry H. Rogers, Jr., deceased, that the doctrine of marshalling should be applied as between the funds comprising the trust herein provided for and the funds comprising the individual estate of Henry H. Rogers, Jr., in order to carry out fully the appointment contained in the will of Henry H. Rogers, Jr., deceased, of the funds herein accounted for in further trust, which said withdrawal is made pursuant to the provisions of said compromise agreement of July 27, 1938, be and the same hereby is in all respects ratified, approved and confirmed.

4. That the contention of said Stephen P. Nash Esq., as such special guardian, and of the executors of the estate of Henry H. Rogers, Jr., deceased, that the doctrine of marshalling should be applied within the trust fund herein accounted for as between the funds appointed in further trust under the appointment contained in the will of said Henry H. Rogers, Jr., deceased; and the funds which are payable or distributable outright be and the same hereby is overruled and dismissed.

5. That the withdrawal of the objections of said Stephen P. Nash, Esq., as such special guardian, to the account of the trustees numbered 1, 2, 3, 4, 5, and 8, pursuant to the said compromise agreement of July 27, 1938, be and the same hereby is in all respects ratified, approved and confirmed.

6. That the objection, numbered 6, of said Stephen P. Nash, Esq., as such special guardian, to the account of the trustees be and the same hereby is sustained upon consent of all parties, and that the account of the trustees be and the same hereby is adjusted by crediting to income and charging against principal one-fourth of the sum of $10,738.26, representing expenses of the Yacht Kanawha, to wit, the sum of $2,684.57, which were erroneously charged against income in Section 7, Exhibit K, Schedule C–II, Part IV (page 1092) of the account filed herein.

7. That the objection of said Stephen P. Nash, Esq., as such special guardian, to the account of said trustees numbered 7 be and the same hereby is overruled and dismissed.

8. That the withdrawal of the contention of respondents Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney, as executors of and trustees under the last will and testament of Henry H. Rogers, Jr., deceased, that the share of Peter Alfred Constantin Maria Salm in the trust fund herein accounted for should be paid to and held by them as trustees pursuant to the provisions of Article Fourteenth of the last will and testament of said Henry H. Rogers, Jr., deceased, which withdrawal is made pursuant to the provisions of said compromise agreement of July 27, 1938, be and the same hereby is in all respects ratified, approved and confirmed.

9. That by Article Twelfth of his last will and testament, said Henry H. Rogers, Jr., validly exercised the power of appointment of the trust fund herein accounted for which was granted him by the last will and testament of Henry H. Rogers, deceased, except as to 6.667% of said fund representing property which already had been held in trust for two lives at the time of the death of said Henry H. Rogers, Jr., and as to the share of said trust fund appointed in further trusts for Peter Alfred Constantin Maria Salm, who was not in being at the time of the death of said Henry H. Rogers, deceased.

136 10. That 6.667% of the one-third share of principal of said trust fund purported to be appointed in further trust for the benefit of said Pauline Hoving by the will of Henry H. Rogers, Jr., deceased, should be paid to her or her assignees outright under the alternative appointment contained in Article Sixteenth of the said will of said Henry H. Rogers, Jr., deceased.

11. That one-half of the balance of said one-third share of principal of said trust fund appointed for the benefit of said Pauline Hoving under said will of said Henry H. Rogers, Jr., deceased, remaining after payment of said 6.667% thereof to said Pauline Hoving, or her assignees, should be paid outright to said Mary Millicent Balcom by reason of the remarriage of said Pauline Hoving, pursuant to the provisions of Article Twelfth of said will.

12. That the remaining one-half of the balance of said one-third share of principal of said trust fund so appointed for the benefit of said Pauline Hoving under said will of said Henry H. Rogers, Jr., deceased, remaining after payment of said 6.667% thereof to said Pauline Hoving, or her assignees, should be paid to Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney as trustees under Article Twelfth

of said last will and testament of Henry H. Rogers, Jr., deceased, to be held in trust by them upon the terms and conditions set forth in said Article Twelfth of said will, for the benefit of said Pauline Hoving.

13. That the income on said one-third share of principal of said trust fund so appointed for the benefit of Pauline Hoving should be distributed pursuant to the provisions of Articles Twelfth and Sixteenth of said last will and testament of Henry H. Rogers, Jr., deceased, as follows: (1) to said Pauline Hoving, (a) all income thereof accrued to April 30, 1937, the date of her remarriage, (b) 6.667% of all income thereof accrued subsequently to said date of remarriage, (c) one-half of the balance of said income accrued subsequently to said date of remarriage, (2) to Mary Millicent Balcom the other one-half of the balance of said income accrued subsequently to said date of remarriage.

14. That 6.667% of the one-third share of principal of said trust fund purported to be appointed in further trust for the benefit of Mary Millicent Balcom by the will of Henry H. Rogers, Jr., deceased, should be paid to her outright under the alternative appointment contained in Article Sixteenth of the will of said Henry H. Rogers, Jr., deceased.

15. That the balance of said one-third share of principal of said trust fund appointed for the benefit of said Mary Millicent Balcom under said will of Henry H. Rogers, Jr., remaining after payment of said 6.667% thereof to said Mary Millicent Balcom, should be paid to Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney, as trustees for the benefit of said Mary Millicent Balcom under the provisions of Article Twelfth of the said last will and testament of said Henry H. Rogers, Jr., deceased.

16. That the entire income of said one-third share of principal of said trust fund appointed for the benefit of said Mary Millicent Balcom under the will of said Henry H. Rogers, Jr., deceased, should be paid to her under the provisions of Articles Twelfth and Sixteenth of the last will and testament of said Henry H. Rogers, Jr., deceased.

137 17. That 6.667% of the one-third share of principal of said trust fund purported to be appointed in further trust for the benefit of Peter Alfred Constantin Maria Salm by the will of Henry H. Rogers, Jr., deceased, should be paid to said Mary Millicent Balcom and John Caldwell Myers as co-general guardians of the estate of said Peter Alfred Constantin Maria Salm, an infant, under the alternative appointment

contained in Article Sixteenth of the last will and testament of said Henry H. Rogers, Jr., deceased.

18. That out of the balance of said one-third share of principal of said trust fund purported to be appointed in further trust for the benefit of said Peter Alfred Constantin Maria Salm under said will of Henry H. Rogers, Jr., deceased, remaining after payment of said 6.667% thereof to his co-general guardians, the sum of $500,000 should be paid to Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney, as trustees under Article Thirteenth, subdivision 3 of the last will and testament of Henry H. Rogers, Jr., deceased, to be held in trust by them upon the terms and conditions set forth in said Article with all of the powers and authority granted said trustees under said will and set forth in the compromise agreement of July 27, 1938, said payment being made pursuant to the provisions of the said compromise agreement of July 27, 1938.

19. That the balance of principal of said one-third share of principal of said trust fund purported to be appointed in further trust for the benefit of said Peter Alfred Constantin Maria Salm under said will of Henry H. Rogers, Jr., deceased, remaining after payment of said 6.667% thereof to his co-general guardians and after payment of said $500,000 to the said trustees under the will of said Henry H. Rogers, Jr., deceased, should be paid to said Mary Millicent Balcom and John Caldwell Myers, as co-general guardians of said Peter Alfred Constantin Maria Salm under the alternative appointment contained in Article Sixteenth of the said will of said Henry H. Rogers, Jr., deceased, and pursuant to the provisions of said compromise agreement of July 27, 1938.

20. That the entire income of said one-third share of principal of said trust fund appointed for the benefit of Peter Alfred Constantin Maria Salm under the will of said Henry H. Rogers, Jr., deceased, should be paid outright to said Mary Millicent Balcom and John Caldwell Myers, Esq., as co-general guardians of the estate of said Peter Alfred Constantin Maria Salm pursuant to the provisions of said compromise agreement of July 27, 1938.

And the said Surrogate having examined said account, supplemental accounts and supplemental affidavit and having adjusted the same now here finds the state and condition of said account to be as stated in the following summary statement thereof made by the Surrogate as judicially settled and adjusted by him to be recorded with and taken to be a part of the decree in this matter, to wit:

138 SUMMARY STATEMENT OF THE ACCOUNT OF PROCEEDINGS OF CITY BANK FARMERS TRUST COMPANY, ADRIAN H. LARKIN AND WILLIAM R. COE, AS TRUSTEES OF THE TRUST CREATED FOR THE BENEFIT OF HENRY H. ROGERS, JR. UNDER ARTICLE EIGHTH OF THE LAST WILL AND TESTAMENT OF HENRY H. ROGERS, DECEASED.

For the period from the Inception of said trust to July 5, 1918

The Trustees are charged:		
1—As to Principal		
With Receipts, as per Schedule 'A' I hereof	$5,835,270.67	
With Increase, as per Schedule 'A' II hereof	12,139.42	
With Receipts as per Schedule 'A' III hereof	2,351.23	
	$5,849,761.32	
Less: Decrease, as per Schedule 'B' hereof	37,729.20	$5,812,032.12
2—As to Income		
With Receipts, as per Schedule 'A' IV hereof	$1,310,853.54	
With Receipts, as per Schedule 'A' V hereof	122,051.77	
With Receipts for the individual account of Henry H. Rogers, as per Schedule 'A' VI hereof	15,027.79	1,447,936.10
Total charge		$7,259,968.22
The Trustees are credited:		
1—As to Principal:		
With Payments as per Schedule 'C' I hereof		$ 74.65
139 2—As to Income:		
With Payments, as per Schedule 'C' II Part 1 hereof	$ 3,661.67	
With Payments, as per Schedule 'C' II Part 2 hereof	25,112.44	
With Payments for accrued interest as per Schedule 'D' hereof	8,721.35	
With Payments to Henry H. Rogers as per Schedule 'E' hereof	1,257,382.77	1,294,878.23
Total credit		$1,294,952.88
Total charge as above		$7,259,968.22
Total credit as above		1,294,952.88
Leaving balance of Trust Fund on hand July 5, 1918:		
Of Principal, as per Statement annexed	$5,811,957.47	
Of Income, as per Statement annexed	153,057.87	$5,965,015.34

Consisting of:		
Stocks and Securities held as Investments of Principal, as per Schedule 'G' III hereof	$5,813,087.80	
Stocks and Securities received as Dividends upon Investments of the Trust and which are regarded as Income, deliverable to the Beneficiary, as per Schedule 'G' IV hereof	80,126.00	
Cash	71,801.54	
	$5,965,015.34	

For the period from July 5, 1918, to December 31, 1922

The Trustees are charged:

1—As to Principal:			
With balance on hand, as per Trustees' former account dated July 5, 1918		$5,811,957.47	
With receipts, as per Schedule 'A' II hereof		8,147,369.99	
With increase, as per Schedule 'A' III hereof	$4,531,657.19		
Less: Decrease as per Schedule 'B' hereof	581,550.09	3,950,107.10	$17,909,434.56
2—As to income:			
With balance on hand, as per Trustees' former Account, dated July 5, 1918		$153,057.87	
With receipts, as per Schedule 'A' V hereof		1,745,155.75	
With receipts, as per Schedule 'A' VI hereof		497,418.48	
With receipts, as per Schedule 'A' VII hereof		59,012.05	
			2,454,644.15
Total charge			$20,364,078.71

The trustees are credited:

1—As to Principal:			
With payments, as per Schedule 'C' I Part 1 hereof		$2,391.04	
With payments, as per Schedule 'C' I Part 2 hereof		224,245.30	
With payments, as per Schedule 'E' I hereof		8,793,854.32	$9,020,490.66
2—As to Income:			
With payments, as per Schedule 'C' II Part 1 hereof		$622.70	
With payments, as per Schedule 'C' II Part 2 hereof		45,550.99	
With payments, as per Schedule 'C' II Part 3 hereof		80,404.84	
With payments, as per Schedule 'D' hereof		19,242.53	
With payments, as per Schedule 'E' II hereof		1,793,626.54	
			1,939,447.60
Total credits			10,959,938.26

Total charge as above		$20,364,078 71
Total credit as above		10,959,038 26
Leaving balance of Trust Fund on hand December 31, 1932:		
Of Principal, as per statement annexed	$8,888,943 90	
Of Income, as per statement annexed	515,196 55	
		$9,404,140 45
141 Consisting of:		
Stocks and securities held as Investments of Principal, as per Schedule 'G' IV hereof	$7,966,488 94	
Cash	1,438,051 51	
	$9,404,140 45	

For the Period from December 31, 1922, to September 8, 1924

The trustees are charged:		
1—As to Principal:		
With balance on hand, as per Trustees' former Account, dated December 31, 1922	$8,888,943 90	
With receipts as per Schedule 'A' II hereof	188,000 00	
With receipts, as per Schedule 'A' III hereof	8,457 13	
With Increase, as per Schedule 'A' IV hereof $24,741 76		
Less: Decrease, as per Schedule 'B' hereof 3,151 21	21,590 55	
		$9,106,991 58
2—As to Income:		
With balance on hand, as per Trustees' former Account, dated December 31, 1922	$515,196 55	
With receipts, as per Schedule 'A' V hereof	1,049,056 28	
		1,564,252 83
Total charge		$10,671,244 41
The trustees are credited:		
1—As to Principal:		
With payments, as per Schedule 'C' I Part 1 hereof	$197,015 24	
With payments, as per Schedule 'C' I Part 2 hereof	36,000 00	
With payments, as per Schedule 'E' I hereof	161,500 49	
		394,515 73
2—As to Income:		
With payments, as per Schedule 'C' II Part 1 hereof	$501 66	

142	With payments, as per Schedule 'C' II Part 2 hereof	$43,948.46	
	With payments, as per Schedule 'D' hereof	15,829.53	
	With payments, as per Schedule 'E' II hereof	1,455,430.71	$1,515,705.36
	Total credit		$1,910,221.09
	Total charge as above		$10,671,244.41
	Total credit as above		1,910,221.09
	Leaving balance of Trust Fund on hand September 8, 1924—		
	Of Principal, as per Statement annexed	$8,712,475.85	
	Of Income, as per Statement annexed	48,547.47	$8,761,023.32
	Consisting of:—		
	Stocks and Securities held as Investments of Principal, as per Schedule 'G' III hereof	$8,681,261.33	
	Cash	79,761.99	
		$8,761,023.32	

For the period from September 8, 1924, to December 1, 1932—Principal Account

	The Trustees are charged as follows, with:	
	Amount of stocks and securities on hand September 8, 1924, the date of the Trustees' last accounting, representing investments of principal of the Trust, at the book value or cost of the respective items, together with the cash on hand on said date, as shown in Schedule A–1	$8,712,475.85
	Amount of receipts of principal in cash and securities, from the Trustees under the Will of Henry H. Rogers, deceased, as shown in Schedule A–2	139,481.05
	Amount of refund from the Treasury Department of the United States of America of over-assessment of Federal income tax, as shown in Schedule A–3	53,061.86
	Amount of profit on sale, collection or other distribution of property, which realized an amount greater than the book value or cost thereof, as shown in Schedule A–4	205,111.26
		$9,110,154.02
	The Trustees are credited as follows, with:	
	Amount of payments chargeable against principal for necessary expenses of the Trust, as shown in Schedule B–1	$37,426.57
143	Amount of loss on sale or other disposition of property which realized an amount less than the book value or cost thereof, as shown in Schedule B–2	14,044.89
	Amount of payments to Henry H. Rogers in stocks, securities and cash, at the value at which the respective items of such stocks and securities were delivered, as shown in Schedule B–3	69,749.52

Amount of payment to Henry H. Rogers of refund of over-assessment of Federal income tax, as shown on Schedule B-4	$52,293.53	
Balance of principal on hand December 1, 1932, the date of this accounting, consisting of stocks and securities held as investments of the Trust, at the book value or cost of the respective items, together with the cash on hand, as shown in Schedule E	$8,936,639.51	$9,110,154.02

Income Account

The Trustees are charged as follows, with:		
Balance of cash income on hand September 8, 1924, as per Trustees' former account, dated September 8, 1924		$48,547.47
Receipts of income from the collection of coupons, dividends and interest as shown in Schedule F		$5,471,529.50
		$5,520,076.97
The Trustees are credited as follows with:		
Payments of income for necessary expenses of the Trust, as shown in Schedule G-1	$17,817.50	
Payments of income on account of Trustees' commissions, as shown in Schedule G-2	342,210.51	
Payments of income for accrued interest or for accrued dividends on investments purchased, as shown in Schedule G-3	7,100.46	
Payments of income from the Trust Estate to Henry H. Rogers, the life beneficiary, as shown in Schedule G-4	5,121,584.76	
Balance of cash income on hand, December 1, 1932	31,363.74	$5,520,076.97

144 For the period from December 1, 1932 through November 3, 1938—Principal Account

The Trustees are charged as follows:		
With amount of assets on hand as per Trustees' former account dated December 1, 1932, as shown by Schedule "A"	$8,936,639.51	
With increase, as shown in Schedule "A-1"	5,399,645.12	
With increase, as shown in Supplemental Schedule "A-1"	313.41	
With increase, as shown in Supplemental Schedule "AA-1"	25,823.00	
With additional assets received, as shown by Supplemental Schedule "AA-2"	332.71	
		$14,362,753.75
The Trustees are credited as follows:		
With decreases, as shown by Schedule "B"	$1,116,611.04	
With decreases, as shown by Supplemental Schedule "B"	270.00	
With decreases, as shown by Supplemental Schedule "BB"	757,091.07	

With amount of disbursements as shown by Schedule "C"	$156,461.24	
With amount of disbursements as shown by Supplemental Schedule "C"	119,611.54	
With amount of disbursements as shown by Supplemental Schedule "CC"	6,675.45	
With amount transferred to income as shown by Schedule "C-1"	25,637.67	
With amount of distributions as shown by Supplemental Schedule "F"	3,500,000.00	
		$5,682,358.01
		$8,680,395.74
From which should be deducted one-fourth of the expenses of the Yacht Kanawha in accordance with objection numbered 6 of Stephen P. Nash, Esq. sustained by the Surrogate		2,684.57
145 Leaving a balance on hand as shown by Supplemental Schedule "HH" consisting of:		
Securities	$7,011,263.11	
Cash	1,666,448.06	
		$8,677,711.17

Income Account

The Trustees are charged as follows:		
With amount of income on hand, as per Trustees' former account dated December 1, 1932, as shown by Schedule "AA"	$31,363.74	
With amount of income collected as shown by Schedule "A-3"	1,360,644.29	
With amount of income collected as shown by Supplemental Schedule "A-3"	140.93	
With amount of income collected as shown by Supplemental Schedule "AA-3"	3,438.25	
With amount of income collected as shown by Schedule "A-3(a)"	550,888.68	
With amount of income collected as shown by Supplemental Schedule "A-3(a)"	220,249.89	
With amount of income collected as shown by Supplemental Schedule "AA-3(a)"	391,821.99	
With amount of income collected as shown by Schedule "A-4"	1,557.70	
With amount of increase as shown by Schedule "H-1"	176.50	
With amount of increase as shown by Supplemental Schedule "AA-5(a)"	2,566.06	
		$2,563,348.03
The Trustees are credited as follows:		
With amount of decrease, as shown by Supplemental Schedule "AA-5"	$101.20	
With amount of decrease, as shown by Supplemental Schedule "A-5"	3.75	
With amount of decrease, as shown by Supplemental Schedule "HH-1"	179.08	
With amount of disbursements as shown by Schedule "C-2"	2,877.26	

146 With amount of disbursements as shown by Schedule "C-2 (a)"	$10.60	
With amount of disbursements as shown by Supplemental Schedule "C-2 (a)"	5.93	
With amount of disbursements as shown by Supplemental Schedule "CC-2 (a)"	5.26	
With amount of commissions as shown by Schedule "C-3"	112,587.67	
With amount of commissions as shown by Schedule "C-3 (a)"	20,709.41	
With amount of commissions as shown by Supplemental Schedule "CC-3 (a)"	13,723.65	
With amount of payments as shown by Schedule "F-1"	1,210,020.82	
With amount of payments as shown by Schedule "F-2"	114,704.69	
With amount of payments as shown by Supplemental Schedule "F-2"	50,840.87	
With amount of payments as shown by Supplemental Schedule "FF-2"	118,597.27	
		1,644,367.46
		$918,980.57
To which should be added one-fourth of the expenses of the Yacht Kanawha in accordance with objection numbered 6 of Stephen P. Nash, Esq., sustained by the Surrogate		2,684.57
Leaving a balance of income on hand as shown by Supplemental Schedule "HH-1" consisting of:		
Securities	$842.72	
Cash	920,822.42	$921,665.14

147 And it appearing that said trustees and the executor of said deceased trustee have fully accounted for all the moneys and property of said trust fund which have come or should have come into their hands as such trustees or into the hands of said deceased trustee and said account having been adjusted by the Surrogate and a summary statement having been made as above set forth and herewith recorded, it is hereby

Ordered, adjudged, and decreed as follows:

21. That the account of proceedings of City Bank Farmers Trust Company, Adrian H. Larkin and William R. Coe, as trustees, and of John W. Sterling, deceased trustee, of the trust fund created for the benefit of Henry H. Rogers, Jr. under Article Eighth of the last will and testament of Henry H. Rogers, deceased, be and the same hereby is judicially settled and allowed, and that the filing as part of said account of the first and second supplemental accounts and supplemental affidavit of said trustees without issuance of a separate citation be and the same hereby is ratified, approved and confirmed.

22. That out of the balance of principal remaining in their hands, as above set forth, said trustees make the following payments:

To Stephen P. Nash, Esq., as and for his allowance as special guardian herein for the infants Arturo Henry Peralta Ramos and Paul Jaime Peralta Ramos and for the unknown and unborn parties herein	$37,427.07
To John Caldwell Myers, Esq., as and for his allowance as co-general guardian appearing herein for his ward Peter Alfred Constantin Maria Salm, and infant	$35,000.00
To City Bank Farmers Trust Company as and for the commissions to which it is entitled on this accounting for receiving and paying out principal of said trust fund	$108,576.98
To Adrian H. Larkin Esq., as and for the commissions to which he is entitled on this accounting for receiving and paying out principal of said trust fund	$123,421.78
To William R. Coe, as and for the commissions to which he is entitled on this accounting for receiving and paying out principal of said trust fund	$123,421.78
To Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney as executors of the last will and testament of Henry H. Rogers, Jr., deceased, in payment of the balance of principal of said trust fund which was due said Henry H. Rogers, Jr. upon attaining the age of forty years and was not then paid to him	$17,914.74

And it appearing that it is necessary that the trustees retain in their hands the sum of $5,509,597.55 as a reserve for the purpose of paying possible additional estate and income taxes and legal and other expenses and commissions of said trust fund;

148 And it further appearing that all parties interested in the principal of said trust fund have executed duly acknowledged consents to distribution of the securities remaining in the hands of said trustees in kind, which consents have been filed herein, and which consents set forth in Schedule I annexed thereto certain designated securities to be retained by said trustees on account of said reserve herein, it is hereby further

Ordered, adjudged, and decreed:

23. That said trustees set aside and retain in their hands as and for such reserve the securities listed and set forth in Schedule I attached to said consents to distribution in kind at the values set opposite the same, amounting in all to $5,344,309.61 and the sum of $165,287.94 in cash and that from said reserve said trustees pay any and all estate and income taxes and legal and other expenses and commissions which may be or may become due and payable therefrom, that as and when such taxes and other charges are paid from time to time said trustees may pay over and distribute such portion of such reserve fund as may be thereby released and that after payment of all such charges said trustees pay over and distribute any

balance of said reserve remaining in their hands to the persons entitled to distribution of principal of said trust fund in the proportions to which they are entitled, as hereinbefore determined, and that pending final distribution of such reserve the income therefrom be collected and distributed by said trustees directly to the persons entitled to receive income of said trust fund in the proportions to which they are entitled as hereinbefore determined without responsibility on the part of Central Hanover Bank & Trust Company, Adrian H. Larkin and Albert Stickney as Executors of and Trustees under the will of Henry H. Rogers, Jr., deceased, for the collection and distribution of such income.

24. That so long as such reserve or any part thereof shall remain in the hands of said trustees they shall have the sole responsibility with respect to the administration thereof and there shall be vested in said trustees all of the powers and authority with respect to the holding, management, sale, investment and reinvestment of assets comprising said reserve which are granted to them by the will of Henry H. Rogers, deceased, or which they may have by operation of law and that said reserve shall be administered by them in all respects in accordance with the provisions of the will of Henry H. Rogers, deceased, relating to the said trust fund.

And it appearing that after making the payments and deductions hereinbefore directed there will remain in the hands of said trustees a balance of principal of said trust fund of $2,722,351.27 of which $1,055,397.77 is in cash and the balance is invested in securities at the values set opposite the same in the consents to distribution in kind filed herein, it is further

Ordered, adjudged, and decreed:

That said trustees pay over, transfer and distribute said balance of principal as follows:

25. That one-third of said balance of $2,722,351.27, to wit, $907,450.42 be set aside and constituted as the share of Pauline Hoving, consisting of $351,799.26 in cash and $555,651.16 in the securities set forth in Schedule II annexed to said consents to distribution in kind filed herein at the values set opposite the same in lieu of the money value thereof.

149 26. That out of the share of said Pauline Hoving as so constituted, the sum of $60,501.29 in cash, representing 6.667% of said share, which she or her assignees are entitled to receive outright be disposed of as hereinafter set forth in decretal paragraph numbered 41 of this decree.

27. That one-half of the balance of the share of said Pauline Hoving remaining after deduction of said 6.667%, as hereinbefore directed, to wit, the sum of $423,474.56 be paid over

and transferred outright to Mary Millicent Balcom in payment of her distributive share therein under the provisions of the will of Henry H. Rogers, Jr., deceased, by reason of the remarriage of said Pauline Hoving, and that said payment and transfer be made by paying said Mary Millicent Balcom in cash the sum of $145,648.98 and by transferring and delivering to her the securities set forth in Schedule III annexed to the consents to distribution in kind filed herein at the values set opposite the same therein, amounting in all to the sum of $277,825.58.

28. That the other one-half of said balance of share of said Pauline Hoving remaining after deduction of said 6.667% as hereinbefore directed, to wit, the sum of $423,474.57 be paid over and transferred to Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney as trustees for the benefit of said Pauline Hoving under Article twelfth of the last will and testament of Henry H. Rogers, Jr., deceased, and that said payment and transfer be made by paying said trustees in cash the sum of $145,648.99 and by transferring and delivering to them the securities set forth in Schedule III annexed to the consents to distribution in kind filed herein at the values set opposite the same therein, amounting in all to $277,825.58.

29. That one-third of said balance of $2,722,351.27 of principal, to wit, the sum of $907,450.42 be set aside and constituted as the share of Mary Millicent Balcom, consisting of $351,799.25 in cash and $555,651.17 in the securities set forth in Schedule II annexed to said consents to distribution in kind filed herein at the values set opposite the same in lieu of the money value thereof.

30. That out of said share of said Mary Millicent Balcom as so constituted, the sum of $60,501.29 in cash representing 6.667% of said share which she is entitled to receive outright be paid to her by said trustees.

31. That the balance of the share of said Mary Millicent Balcom remaining after deduction of said 6.667% as hereinbefore directed, to wit, the sum of $846,949.13 be paid over and transferred to Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney as trustees for the benefit of said Mary Millicent Balcom under Article twelfth of the last will and testament of Henry H. Rogers, Jr., deceased, and that said payment and transfer be made by paying said trustees in cash the sum of $291,297.96 and by transferring and delivering to them the securities set forth in Schedule II annexed to the consents to distribution in kind filed herein at

the values set opposite the same therein, amounting in all to $555,651.17.

32. That one-third of said balance of $2,722,351.27 of principal, to wit, $907,450.43 be set aside and constituted as the share of Peter Alfred Constantin Maria Salm, consisting of $351,799.26 in cash and $555,651.17 in the securities set forth in Schedule II annexed to said consents to distribution in kind filed herein at the values set opposite the same in lieu of the money value thereof.

150 33. That out of the share of said Peter Alfred Constantin Maria Salm as so constituted, the sum of $60,501.29 in cash, representing 6.667% of said share which he is entitled to receive outright, be paid by said trustees to Mary Millicent Balcom and John Caldwell Myers, Esq. as co-general guardians of the estate of said Peter Alfred Constantin Maria Salm, an infant.

34. That out of the balance of the share of said Peter Alfred Constantin Maria Salm remaining after deduction of said 6.667%, as hereinbefore directed, to wit, the sum of $846,949.14, there be paid over and transferred the sum of $500,000 to Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney as trustees for the benefit of said Peter Alfred Constantin Maria Salm under Article Thirteenth, subdivision 3 of the last will and testament of Henry H. Rogers, Jr., deceased, and that payment and transfer be made by paying to said trustees the sum of $222,174.42 in cash and by transferring and delivering to them the securities set forth in Schedule III annexed to the consents to distribution in kind filed herein at the values set opposite the same therein, amounting to $277,825.58.

35. That the balance of the share of said Peter Alfred Constantin Maria Salm remaining after deduction of said 6.667% and said $500,000 as hereinbefore directed, to wit, the sum of $346,949.14, be paid over and transferred to Mary Millicent Balcom and John Caldwell Myers, Esq. as co-general guardians of said Peter Alfred Constantin Maria Salm, an infant, and that said payment and transfer be made by paying to said co-general guardians in cash the sum of $69,123.55 and by transferring and delivering to them the securities set forth in Schedule III annexed to the consents to distribution in kind filed herein at the values set opposite the same therein, amounting to $277,825.59.

And it appearing that the amounts hereinbefore directed to be retained by the trustees as a reserve fund for the payment of taxes and other expenses, consist largely of securities at

agreed values and that it is possible that said securities may fail to realize upon liquidation the amounts which may be necessary to pay such taxes and other expenses as and when the same become due and payable and that said taxes and other expenses in such event should be paid from the principal amounts hereinbefore directed to be distributed, it is hereby

Ordered, adjudged, and decreed:

36. That the distributions of principal directed to be made in this decree to Pauline Hoving or her assignees, Mary Millicent Balcom, Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney, as trustees under the last will and testament of Henry H. Rogers, Jr., deceased, for the benefit of Pauline Hoving; Peter Alfred Constantin Maria Salm, and of Mary Millicent Balcom, respectively, and Mary Millicent Balcom and John Caldwell Myers, Esq., as co-general guardians of the estate of Peter Alfred Constantin Maria Salm, an infant, shall be deemed made subject to any taxes or other proper charges which hereafter may be found to be due and payable from said trust fund, and the said trustees shall receive and the said distributees shall deliver to the said trustees as a condition of the payments of principal directed to be made by this decree to said beneficiaries a refunding agreement containing a provision on the part of the said distributees that out of the amounts whether cash or securities received by them pursuant to the provisions of this decree, or as the case
151 may be out of the proceeds of sale, investment or reinvestment thereof, but only to the extent thereof, they agree to reimburse and repay said trustees their proportionate share or shares of any such taxes or other charges which may become due and payable from said trust funds in excess of the amount remaining or available in the hands of the trustees for the purpose of meeting the same.

36a. That any refund that may become due and payable from the share of said Pauline Hoving pursuant to the provisions of paragraph 36 of this decree, shall first be refunded and paid from the principal directed to be paid to her outright under this decree, and only in the event that such principal funds paid to her outright shall be not sufficient for the purpose of paying said refund shall any excess of such refund not repaid by her be repaid proportionately by her assignees set forth in decretal paragraph 41 of this decree in the proportions which the amounts of principal which said assignees receive thereunder bear to each other.

36b. That any refund that may become due and payable from the share of said Peter Alfred Constantin Maria Salm

pursuant to the provisions of paragraph 36 of this decree, shall first be refunded and paid from the principal directed to be paid outright to Mary Millicent Balcom and John Caldwell Myers, Esq., as co-general guardians of the estate of said Peter Alfred Constantin Maria Salm under this decree, and only in the event that such principal funds paid to said co-general guardians outright be not sufficient for the purpose of paying said refund, shall any excess of such refund not repaid by said co-general guardians be repaid out of the sum of $500,000 which is directed by decretal paragraph 18 of this decree to be paid to Central Hanover Bank & Trust Company, Adrian H. Larkin and Albert Stickney, as Trustees under Article Thirteenth, Subdivision 3, of the last will and testament of Henry H. Rogers, Jr., deceased.

And it further appearing from the summary statement of the account of said trustees as hereinbefore set forth that there remains in the hands of said trustees a balance of income of said trust of $921,665.14 which is distributable as set forth in Schedule B annexed to the supplemental affidavit filed herein, it is hereby

Ordered, adjudged, and decreed:

37. That out of the said balance of income so remaining in their hands, the Trustees make the following payments:

To City Bank Farmers Trust Company as and for the commissions to which it is entitled upon this accounting for receiving and paying out income of said trust	$11,364.98
To Adrian H. Larkin, Esq., as and for the commissions to which he is entitled upon this accounting for receiving and paying out income of said trust	12,130.27
To William R. Cee, Esq., as and for the commissions to which he is entitled upon this accounting for receiving and paying out income of said trust	12,130.26
To Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney, as executors of the last will and testa- of Henry H. Rogers, Jr., deceased, the sum of	62,027.07
152 Which payment shall be made by paying to them in cash the sum of $61,184.35 and by transferring and delivering to them the securities held for the benefit of the estate of said Henry H Rogers, Jr., deceased, as set forth in Schedule "III-1" of the second supplemental account filed herein at the value set opposite the same therein, to wit, $842.72.	
To themselves to be held as a reserve for payment of commissions on income reserves	12,812.19

and it further appearing that after making payments and deductions as hereinbefore directed there will remain in the hands of said trustees a balance of income of said trust fund of $811,200.37 all of which is cash, which amount is distributable as set forth in said Schedule B annexed to said supplemental affidavit filed herein, it is hereby further

Ordered, adjudged, and decreed:

That said trustees pay over, transfer, and distribute said balance of income as follows:

38. That they set aside the sum of $206,7[illegible]42 as and for the share of Pauline Hoving and that out of said amount they retain the sum of $151,031.84 as a reserve against possible income taxes or other charges apportionable to her said share and that they dispose of the balance of said share amounting to $145,748.58 as hereinafter set forth in decretal paragraph 41 of this decree.

39. That they set aside the sum of $199,631.90 as and for the share of Mary Millicent Balcom and that out of said amount they retain the sum of $109,794.55 as a reserve against possible income taxes or other charges apportionable to her said share and that they pay over the balance of said share amounting to $89,837.35 to said Mary Millicent Balcom outright.

40. That they set aside the sum of $314,788.05 as and for the share of Peter Alfred Constantin Maria Salm and that out of said amount they retain the sum of $153,434.54 as a reserve against possible income taxes or other charges apportionable to his said share, and that they pay over the balance of said share amounting to $161,353.51 to Mary Millicent Balcom and John Caldwell Myers, Esq., as co-general guardians of the estate of Peter Alfred Constantin Salm, an infant, outright.

And it appearing that there is due and payable to said Pauline Hoving from said trust fund the sum of $60,501.29 of principal and the sum of $145,748.58 of income as hereinbefore determined, making a total of $206,249.87 in all, and that said Pauline Hoving has consented and requested that out of said amount due her, whether principal or income, there be paid and satisfied the amounts due under the several assignments of her interest in said trust fund executed by her and referred to and set forth in Schedule I of the main account filed herein and in the supplemental affidavit filed herein, it is hereby

Ordered, adjudged, and decreed:

41. That said amount of $206,249.87 due said Pauline Hoving be paid over and distributed as follows:

153 To The New York Trust Company in payment of the amount due under its assignment dated March 17, 1936, with interest thereon at 4% to January 15, 1939	$43,138.56
To Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney as executors of the last will and testament of Henry H. Rogers, Jr., deceased, in payment of the amount due them under their assignments dated June 31, 1936, and August 12, 1936, respectively, and under the assignments as collateral security to Massachusetts Bonding and Insurance Company as surety of said Pauline Hoving dated December 15, 1936, and June 18, 1937	$48,293.71
To Messrs. Sage, Gray, Todd & Sims in payment of the amount due them under their assignments dated April 16, 1936, and October 6, 1937, with interest thereon at 4% from February 1, 1938, to January 15, 1939	$15,694.36

To Messrs. Mitchell, Taylor, Capron & Marsh in payment of the amount due them under their assignment dated April 29, 1938, with interest thereon at 4% from March 22, 1938, to January 15, 1939	$46,004.29
To Oswald W. Knauth, Esq., in payment of the amount due him under his assignment dated August 31, 1938, with interest thereon at 6% from August 29, 1938, to January 15, 1939	$10,801.95
To said Pauline Hoving the balance of said amount of $206,249.87 remaining after making the payments to her assignees as hereinbefore directed, to wit, the sum of	$12,317.00

And it appearing from Schedule "HH-2" of the second supplemental account filed herein that the trustees hold in their possession the sum of $4,293.07 not forming any part of the assets of the trust fund herein accounted for, but representing amounts held by them for the account of the estate of Henry H. Rogers, Jr., deceased, which were due and payable to him by reason of his attaining the age of forty years and which have come into the possession of said trustees by way of distribution from the so-called "General Trust Fund", it is hereby

Ordered, adjudged, and decreed:

42. That said trustees pay over said sum of $4,293.07 to Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney as executors of the last will and testament of Henry H. Rogers, Jr., deceased; and it is further

Ordered, adjudged, and decreed:

43. That this decree is made without prejudice to the right of said trustees to pay and the right of counsel for said trustees to apply for and receive, pursuant to Section 231-a of the Surrogate's Court Act, or otherwise, compensation for legal services rendered in addition to those services which have already been paid for by said trustees, provided, how-
154 ever, that the amount of any such additional compensation shall be subject to the approval of the persons beneficially interested in the said trust fund and of this Court; and it is further

Ordered, adjudged, and decreed:

44. That upon complying with the provisions of this decree, City Bank Farmers Trust Company, Adrian H. Larkin and William R. Coe be and they hereby are discharged from any and all further liability, responsibility, or accountability for or by reason of any matter, cause, or thing whatsoever connected with or growing out of their administration of the trust fund created for the benefit of Henry H. Rogers, Jr., deceased, under Article Eighth of the Last Will and Testament of Henry H. Rogers, deceased, contained, or referred to or covered by their accounts as filed herein or in this decree, except that said trustees remain charged with and accountable for the balances

of principal and income directed to be reserved and retained by them by this decree; and it is further

Ordered, adjudged, and decreed:

45. That the estate of John W. Sterling, deceased trustee of the said trust fund created for the benefit of Henry H. Rogers, Jr., deceased, under Article Eighth of the last will and testament of Henry H. Rogers, deceased, and City Bank Farmers Trust Company, as sole surviving executor of the estate of said deceased trustee, be and they hereby are discharged from any and all further liability, responsibility, or accountability for or by reason of any matter, cause, or thing whatsoever connected with or growing out of the administration of said trust fund by the said deceased trustee or referred to or covered by the account of said deceased trustee as filed herein or in this decree; and it is further

Ordered, adjudged, and decreed:

46. That any party to this proceeding may apply at the foot of this decree for such other and further relief as such party may deem proper or necessary.

JAMES A. FOLEY,
Surrogate.

135 No File Number. Surrogate's Court, County of New York. In the matter of the Judicial Settlement of the Account of Proceedings of City Bank Farmers Trust Company *et al.* as Trustees of the Trust Created for the Benefit of Henry H. Rogers, Jr., under Article Eighth of the Last Will and Testament of Henry H. Rogers, deceased. Decree with Notice of Settlement. David, Polk, Wardwell, Gardiner & Reed, Attorneys for Petitioners, 15 Broad Street, Borough of Manhattan, City of New York, New York.

156 In the United States Circuit Court of Appeals for the Second Circuit

Docket No. 100026

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW

v.

ADRIAN H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY H. ROGERS, DECEASED, RESPONDENT ON REVIEW

Præcipe for record on review

To the Clerk of The Tax Court of the United States:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board of Tax Appeals.
2. Pleadings before the Board of Tax Appeals:
   (a) Petition, including annexed copy of deficiency notice.
   (b) Answer.
3. Transcript of hearing before the Board on June 5, 1941.
4. Memorandum Opinion and decision of the Board, including memorandum accompanying decision.
5. Transcript of hearing before the Board on March 18, 1942.
6. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
7. Stipulation of Facts, including Exhibits "A," "B," "C," and "D."

157 8. Order enlarging time for the preparation of the evidence and for the transmission and delivery of the record, not included in record.

9. This praecipe.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 12th day of November 1942.

Agreed to:

JOHN W. DRYE, Jr.
HAROLD A. DONEGAN.
ARTHUR W. SIEGRIST.

John W. Drye, Jr., Harold A. Donegan, and Arthur W. Siegrist, Esqs., Attorneys for Respondents on Review.

RFS-spt 11-6-42.

The Tax Court of the United States, Washington

Docket No. 100026

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HENRY H. ROGERS, DECEASED, ADRIAN H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTORS, RESPONDENT

Certificate

I, B. D. Gamble, clerk of the Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 157, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 20th day of November 1942.

Time for filing record expires December 17, 1942.

[SEAL]

B. D. GAMBLE, *Clerk,*
The Tax Court of the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1942

[fol. 113] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1942

No. 170

(Argued February 4, 1943. Decided April 2, 1943)

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

ESTATE OF HENRY H. ROGERS, Deceased, Adrian H. Larkin, Albert Stickney and Central Hanover Bank and Trust Company, Executors, Respondents

Petition by the Commissioner of Internal Revenue to review a decision of the Tax Court of the United States. Reversed.

Before L. Hand, Chase and Frank, Circuit Judges.

Samuel O. Clark, Jr., Assistant Atorney General, Sewall Key, Helen R. Carloss, Arthur A. Armstrong and N. Barr Miller, Special Assistants to the Attorney General for Petitioner.

John W. Drye, Jr., Harold A. Donegan and Arthur W. Siegrist, for Respondents.

[fol. 114] § 302(f) of the Revenue Act of 1926 provides that "the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * * (f) to the extent of any property passing under a general power of appointment exercised by the decedent (1) by will * * *"

Decedent's father created a testamentary trust. Under its terms, decedent was to receive the income, and, upon attaining the age of 40, one-half of the principal. The balance was to continue in trust with the payment of income to decedent for life; upon his death, the principal was to go to such persons as he might appoint, or, in default of appointment, to his "heirs-at-law," in accordance with the New York law relating to the inheritance of real property. The heirs-at-law of decedent at the time of his death were his widow, his daughter and his son Henry III.

Decedent, by his will, probated in New York, exercised the power of appointment as follows: Of the property sub-

ject to the power, 6.667% was appointed outright in equal shares to his widow, to his daughter and to his grandson, Peter. The balance was divided into three parts as follows: (a) One-third was appointed in trust with the income to the widow for life; upon her death the principal was to go to the then-surviving issue, if any, of her marriage with decedent; in the event of her re-marriage, however, half of that principal was to continue in the trust to her for life but the other half was to go immediately to the remaindermen. (b) Another one-third was appointed in trust with the income to the daughter for life; at her death, the principal of this one-third was to go outright to her issue. (c) The other third was appointed to the decedent's grandson, Peter. When decedent died, his widow was 45 years of age, and his daughter 33 years of age. None of the appointees renounced and elected to take under the will of decedent's father.

[fol. 115] The Commissioner determined that all the property covered by all the appointments should be included in decedent's gross estate under §302(f). On petition to the Tax Court of the United States, it found that the interests appointed to the widow and daughter respectively had a value less than that of the interests which each of them would have received if there had been no exercise of the power, and accordingly excluded from the value of decedent's gross estate the value of the interests appointed to them. The case is here on the Commissioner's petition to review.

FRANK, *Circuit Judge:*

This court disagrees with the Tax Court and agrees with the Commissioner. However, the several members of this court arrive at that conclusion by different paths. I shall, therefore, describe only my own path.

The taxpayer, purporting to rely on *Helvering* v. *Grinnell*, 294 U. S. 153, contends that, if there had been an exact equivalence between the interests appointed to the widow and daughter and the interests which those beneficiaries respectively would have received if the power had not been exercised, then those appointed interests would not be included in decedent's estate under §302(f), and that this is an *a fortiori* case, since the interests appointed to the widow and daughter are less in value than the interests which they

would have received if the power had remained wholly unexercised. I think that the taxpayer has misinterpreted *Helvering* v. *Grinnell*. There, although there was an exact equivalence, the court held, I think, that there was no tax solely because the beneficiaries had renounced the appointments. In other words, I interpret that case as holding that, absent renunciations, there would have been a tax despite the existence of an exact equivalence.

[fol. 116] The taxpayer, citing *Rothensies* v. *Fidelity-Philadelphia Trust Company*, 112 F. (2d) 758 (C. C. A. 2), and *Legg's Estate* v. *Commissioner*, 114 F. (2d) 760 (C. C. A. 4), argues thus: In the *Grinnell* case, the court indicated that the "reasoning and conclusions" of the courts in *Wear* v. *Commissioner*, 65 F. (2d) 665 (C. C. A. 3), and *Lee* v. *Commissioner*, 57 F. (2d) 399 (App. D. C.), were inconsistent with its own conclusion; in each of those cases, there was (a) an exercise of the power and (b) exact equivalence but (c) there was no renunciation; consequently (says taxpayer) there could have been no inconsistency with *Grinnell* if the Supreme Court, in *Grinnell*, had regarded renunciation as in any way a relevant fact; wherefore it is urged the pivotal fact in *Grinnell* was the equivalence.

That argument seems to me to be untenable. It seems clear that the reference to "inconsistency" in the *Grinnell* case is explicable thus: (a) In *Wear* and *Lee*, the courts had reasoned that the interests passed to the beneficiaries by virtue of the exercise of the power, solely because the donee of the power, by designating a stranger, could have divested the beneficiaries of the interests, which they would have received in default of any appointment, with the consequence that the exercise of the power extinguished this possibility of divestiture. Thus in the *Wear* case, the court said (65 F. (2d) at 665): "The generating source of the change was the death of the donee without action adverse to them. That too was the generating source of the tax." In the *Lee* case, the court said (57 F. (2d) at 402): "It is argued that the tax should not apply to that transfer, inasmuch as without it the moiety would nevertheless have become the property of George Bolling Lee as devisee under his father's will. This view cannot be sustained. It is true that, if Robert E. Lee at the time of his decease had entirely omitted to exercise the power of which he was the donee, his brother, George Bolling Lee, would have held the moiety of the

[fol. 117] former by devise under the will of W. H. F. Lee. But, on the other hand, *Robert E. Lee was entitled during his lifetime to appoint the moiety to any other person, and thus defeat the devise to George Bolling Lee.* Therefore the exercise of this power by Robert E. Lee at least confirmed the title of his brother to the moiety in question."[1] (b) Had that reasoning been sound, renunciation of the appointments and election to take under the donor's will would not have avoided a tax; for the alleged effect of the exercise of the power—by way of extinguishing the possibility of divestiture—would still have been operative despite that renunciation and election. (c) There was, accordingly, a plain inconsistency between the "reasoning" of *Wear* and *Lee* and what I understand to be the Supreme Court's ruling in *Grinnell, i. e.*, that it was solely the renunciation which avoided tax.[2] (d) There was a still further inconsistency. As suggested by the opinion of the lower court in *Grinnell*,[3] the reasoning of the courts in *Wear* and *Lee* logically compelled the conclusion that Congress intended to include in §302(f) as "property passing under a general power of appointment *exercised* by the decedent," property which passed when he did not exercise the power; for the non-exercise—as well as the exercise in favor of the beneficiaries in default—would effectuate an extinguishment of the possibility of divestiture, and such an extinguishment accomplished a "passing" under the [fol. 118] power according to *Wear* and *Lee*. But in *Grinnell* it was the "conclusion" of the Supreme Court that §302(f) did not operate unless there was an "exercise of the power." (See 294 U. S. at 155.)

In support of the view that renunciation was not the key factor in *Grinnell*, much is made of the fact that in that case the Supreme Court cited and quoted from *Matter of Lan-*

---

[1] Emphasis added.

[2] In so far as the *Rothensies* and *Legg* cases, *supra*, reach a different conclusion, I think they are in error.

[3] *Grinnell* v. *Commissioner*, 70 F. (2d) 705 (C. C. A. 2). There it was said of the opinion in the *Wear* case (p. 708): "Such reasoning would require the imposition of a tax under the Act even though Annie Stone [the donee of the power] had died intestate though the statute furnishes no warrant for taxation under such circumstances."

sing, 182 N. Y. 238, referring to it as "that well considered case" and saying that "in principle" it "cannot be distinguished." But in the *Lansing* case, the New York court had stressed the fact that the appointee had "elected" to take under the will of the donor, her grandfather, and not under the power of appointment exercised by her mother, the donee of the power. The court said: "There is no evidence in the record that she ever accepted the appointment or claimed title through the exercise of the power, but on the other hand, it sufficiently appears that she elected to reject title from that source. An appointee under a power has the right of election, the same as a grantee under a deed. 'It is essential to the legal operation of a deed that the grantee assents to receive it. It cannot be imposed upon him, and there can be no delivery without an acceptance.' (*Jackson* v. *Dunlap*, 1 Johns. Cas. 114, 116; *Jackson* v. *Phipps*, 12 Johns. 418.) He can accept the title tendered or reject it in his discretion. It cannot be forced upon him against his will. He cannot be compelled to receive additional evidence of title when he does not want it, and does not need it because his title is perfect without it. His consent is necessary before the attempt to exercise the power becomes binding upon him the same as consent is necessary in making a contract or agreement. Declining or refusing to take has the same effect as incapacity to take, as in the case of a devise to a corporation which has no power to hold any more property because the statutory limit has been exceeded. The title is not affected, but remains where [fol. 119] it was before." The Supreme Court, in *Grinnell* (284 U. S. at 157), when referring to *Lansing*, noted that the state court had said "that it sufficiently appeared that she elected to reject title" through the power, and quoted from the *Lansing* opinion the discussion concerning "election" and "declining or refusing to take."

Notwithstanding the foregoing, I might hesitate to interpret *Grinnell* as I have done, because of a seemingly contrary interpretation by this court in *Hanover Bank & Trust Company* v. *Commissioner*, 118 F. (2d) 270, 273, were it not for the subsequent decision in *Helvering* v. *Safe Deposit Company*, 316 U. S. 55, 56. There relatives of a decedent asserted a claim as appointees under his will, or in the alternative, as his heirs by intestacy. The claim was compromised and the question was whether there was any tax under §302(f) because of the appointment. The Su-

preme Court held that there was such a tax and remanded the case to the Tax Board to determine how much of the property should be deemed to have passed under the appointment (with the consequence that it was taxable) and how much by intestacy (with the consequence that it was not taxable). In the course of the court's opinion, it discussed a contention that the "taxable event" occurred upon the death of the decedent and that a tax could not be based upon the compromise since it occurred after that event. Answering that contention, the court said: "Whatever may the general rule in this respect, this court has clearly recognized in *Helvering* v. *Grinnell*, 294 U. S. 153, that events subsequent to the decedent's death, *events controlled by his beneficiaries, can determine the inclusion or not of certain assets within the decedent's gross estate under §302 (f).* In that case, the decedent had exercised a general testamentary power of appointment, an act which, under §302(f), bring the property subject to the power within the gross estate. *The subsequent renunciation by the ap-* [fol. 120] *pointees* of the right to receive by appointment *and their election to take as remaindermen in default of appointment were held by this court to place the property subject to the power outside the scope of §302(f).*"[4] This comment is meaningless unless the court regarded the renunciation as the significant factor in *Grinnell*. The minority opinion in the *Safe Deposit* case similarly interprets *Grinnell*, saying (316 U. S. at 68): "In *Helvering* v. *Grinnell*, *supra*, the decedent exercised the power, but *the appointees*, as was their right under state law, *elected not to take under the appointment* but to take as remaindermen directly from the estate of the creator of the power, and it was held that §302 could not be invoked to impose a tax upon the estate of the decedent."[5]

Accordingly, I think that the Tax Court here was wrong, and that, as there were no renunciations, all the appointed interests must be included in decedent's estate under §302(f).

The decision of the Tax Court is reversed.

---

[4] Emphasis added.

[5] Emphasis added.

L. HAND, *Circuit Judge* (concurring):

The donor in the case at bar made the gift in default conditional upon the failure of the donee to exercise the power, but the donee did exercise the power and the appointees accepted the appointment; it is therefore hard to see how in strict logic anything could pass under the will. A conditional interest does not take effect unless the condition is fulfilled; and indeed it can be argued that even though the appointees renounce, they should not be allowed to take under the gift in default, for renunciation after exercise of [fol. 121] the power is not the equivalent of a failure to exercise it. But that would result in forcing the appointees to choose between taking under the power or taking nothing at all, and the Supreme Court, following *In Re Lansing*, 182 N. Y. 238, refused to go so far in *Helvering* v. *Grinnell*, 294 U. S. 153, and held that when the appointees renounced, the property passed under the gift in default. There would have been nothing in that decision to contradict the theory that when they do not renounce, the property passes under the power, were it not that at the conclusion of the opinion (page 158) the court said that it had granted certiorari because the two cases of *Wear* v. *Commissioner*, 65 Fed. (2) 665 and *Lee* v. *Commissioner*, 57 Fed. (2) 399, were in conflict with the decision below; and then went on to say: "The reasoning and conclusions of those courts and of the court below cannot be reconciled. We are of opinion that, to the extent of the conflict, the view of the former is wrong and that of the court below is right." In both *Wear* v. *Commissioner*, *supra*, and *Lee* v. *Commissioner*, *supra*, the appointee had not, however, renounced, and *pro tanto* the reasoning in neither was in conflict with what had been said below as to the effect of renunciation; nor could it be. There was indeed conflict in reasoning because the two earlier cases had held that the exercise of a general power made the property a part of the donee's estate, which the lower court in *Helvering* v. *Grinnell*, *supra*, denied. The conflict in conclusion was necessarily complete, for the two earlier cases had held that the property passed under the power and not under the will, and while there was a ground of reconciliation in the fact of renunciation, the court did not suggest it.

The Third Circuit in *Rothensies* v. *Fidelity-Philadelphia Trust Co.*, 112 Fed. (2) 758 and the Fourth, in *Legg's Estate* v. *Commissioner*, 114 Fed. (2) 760, thought that *Helvering* v. *Grinnell*, *supra*, went further than merely to hold

[fol. 122] that nothing passed under the power in cases of renunciation, and that it required them to compare the interest appointed with that passing under the gift in default, and to adopt as the test whether the first could be regarded as coming out of the second. We at least gave countenance to the same notion in *Central Hanover B. & T. Co.* v. *Commissioner*, 118 Fed (2) 270, 273, and with narrow limitations it is laid down as law in the Restatement of Property, §369. Mr. Griswold has discussed it in 52 Harv. L. R. 929, 933-937 (Powers and the Federal Estate Tax) and Mr. Paul in Federal Estate and Gift Taxation §9.18. I cannot see that *Helvering* v. *Safe Deposit & Trust Co.*, 316 U. S. 56, sheds any light upon the question. In the face of this authority I am not prepared to say that where the appointee does not renounce, the interests appointed must inevitably pass under the power. There is something to be said practically for the contrary, once we refuse to accept the rule that any exercise of the power is irrelevant. Certainly no donee would ever exercise a power in favor of a legatee in default if he knew that its only effect would be to include the property within his taxable estate. Nor does it seem quite fair to put it into the appointee's hands by accepting, instead of renouncing, an appointment which makes no difference to him, to throw the tax upon the donee's estate. On less provocation courts have often avoided such harsh results by holding that the intent of the testator was not correctly expressed in his words. I think that in the case at bar we can leave the question open, because, whatever the scope of the doctrine, it seems to me obvious that no interests should be excluded from the donee's estate to whose creation the exercise of the power was necessary. Assuming for argument that those may be excluded which could have been made to pass under the gift in default by a more sparing use of the power, they must be the limit.

[fol. 123] There are two circumstances, each of which takes the case at bar out of the doctrine so understood: first, the life estates to the wife and daughter were equitable, not legal; and second, Peter, who was not a legatee in default, was an appointee, while Henry III, who was not an appointee, was a legatee in default. As to the first, there was no way other than by exercising the power that the donee could have changed the jural quality of what passed to his wife and daughter under the will. He could of course have appointed remainders to others, but that would not

have been enough. The difference between a legal and an equitable interest might not in all jurisdictions be today considered serious enough to count; we no longer think so rigidly as we used to of a trust as a transfer of title to the trustee against whom the beneficiary has only rights *in personam*. Be that as it may, in New York the beneficiary of a trust like that set up in the case at bar has no power to dispose of the property (Real Property Law §103(1)), and certainly that was a difference with which we cannot suppose that the donee was unconcerned. So I say that since he could not have realized his purpose without exercising the power over the interests of his wife and daughter it cannot be said that they took under the will.

Next as to the objection arising from the donee's appointment of a third interest to Peter for life with remainders over. Having created these, he could not have secured even a legal life interest in a third of the property to his wife or to his daughter without exercising the power over the whole of that third. Had he attempted to do so by merely appointing remainders over after their deaths upon what passed to them under the will, each would have taken a life interest in two-ninths, not one third, for Henry III would have taken a third of the two-thirds not disposed of. Had the donee tried to make up to each her missing ninth [fol. 124] by appointing it under the power, it would have come out of the two-thirds, and would have left to pass under the will, not two ninths to each, but four twenty-sevenths. And so on in an infinite diminishing series. Only by appointing to each her third could he have given her a third; and it follows that, as in the matter of the quality of the interest so in the matter of its quantity, there was no interest which could be left unappointed to pass under the will without mutilating the donee's purpose. This is not true when the appointees and the legatees in default coincide; nor need it be true where the appointees include all the legatees in default and more. For example if the legatees in default were three and the donee wished to have them share equally and in common with a fourth person also sharing, he need only appoint one quarter to the fourth. "Illustration 3" to § 369 of the Restatement is an instance of how the same result could be brought about when the class of legatees in default is not enlarged but the disvision between them is changed. (I should not agree however that only one sixth passed under the power. The

donee would have had to appoint one quarter to his daughter, because what he took from the gift in default would be marshalled against her share as well as the sons.)

For the foregoing reasons I reach the same result as my brother Frank without however committing us to the absolute doctrine that in the absence of renunciation all interests appointed must inevitably pass under the power.

CHASE, *C. J.*, concurs in the result.

[fol. 125] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of April, one thousand nine hundred and forty-three.

Present: Hon. Learned Hand, Hon. Harrie B. Chase, Hon. Jerome N. Frank, Circuit Judges.

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

ESTATE OF HENRY H. ROGERS, Deceased, Adrian H. Larkin, Albert Stickney and Central Hanover Bank and Trust Company, Executors, Respondents.

Appeal from The Tax Court of the United States.

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 126] [Endorsed:] United States Circuit Court of Appeals, Second Circuit, Commissioner of Internal Revenue v. Estate of Henry H. Rogers, deceased, et al. Order for Mandate. United States Circuit Court of Appeals—Second Circuit. April 19, 1943. D. E. Roberts, Clerk.

[fol. 127] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 128] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 21, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Murphy took no part in the consideration or decision of this application.